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No. 95-1387

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ATLANTIC RICHFIELD COMPANY, a Delaware Corporation,
Petitioner,
v.
WEST SIDE DITCH COMPANY, a Montana Corporation; CITY OF DEER LODGE; RONALD KELLY; JERRY RUTLEDGE; CHARLES BECK; RICHARD FORSON; GEORGE REISTAD; THE MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; THOMAS A. BECK; MELVIN R. BECK; ROBERT EVANS,
Respondents.

On Petition for a Writ of Certiorari to the
Ninth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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February 28, 1996

QUESTION PRESENTED

Whether during implementation of an EPA-ordered cleanup under CERCLA, a third-party suit filed in state court for compensatory and punitive damages allegedly caused by the cleanup

(a) is subject to the exclusive subject matter jurisdiction of a federal district court, and

(b) presents a "challenge" to the cleanup or seeks "review" of the EPA order, within the meaning of CERCLA section 9613(h)?

PARTIES TO THE PROCEEDINGS

In the Ninth Circuit, the parties to *Beck v. Atlantic Richfield Co.*, Case Nos. 94-35487 and 94-35551, were plaintiff-appellants/cross-appellees Thomas A. Beck, Melvin R. Beck, Robert Evans, and defendant-appellee/cross-appellant Atlantic Richfield Company. The parties to *West Side Ditch Company v. Atlantic Richfield Company*, Case Nos. 94-35539 and 94-35552, were plaintiffs-appellants/cross-appellees West Side Ditch Company, City of Deer Lodge, Ronald Kelly, Jerry Rutledge, Charles Beck, Richard Forson, George Reistad, defendant-appellee/cross-appellant Atlantic Richfield Company, defendant-appellee Montana Department of Fish, Wildlife and Parks, and intervenor-appellee United States Environmental Protection Agency.

Pursuant to Supreme Court Rule 29.6, petitioner Atlantic Richfield Company states that it does not have a parent company. Petitioner's publicly-traded subsidiaries and affiliates are ARCO Chemical Company, Lyondell Petrochemical Company, and Vastar Resources, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Atlantic Richfield Company respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in these cases.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 62 F.3d 1240, and is included in the appendix at pp. 1a-6a. The Ninth Circuit's order denying rehearing is included in the appendix at pp. 7a-9a. The district court's order denying respondents' motion to remand in the *West Side* action is unreported; it is included in the appendix at pp. 10a. The decisions of the district court granting petitioner's motions to dismiss are unreported; they are included in the appendix at pp. 11a-20a. The district court's orders denying respondents' motions to partially vacate judgment and ARCO's motions to alter or amend judgment are unreported; they are included in the appendix at pp. 21a-22a.

JURISDICTION

The opinion and judgment of the Ninth Circuit was entered on August 17, 1995. Petitioner's timely petition for rehearing was denied by order entered on October 31, 1995. On January 3, 1996, Justice O'Connor granted petitioner's application for extension of time to file this petition, extending the time from January 29, 1996, to and including February 28, 1996. This Court has jurisdiction pursuant to 28 U.S.C.A. § 1254(l) (1993).

STATUTORY PROVISIONS INVOLVED

The provision governing removal to federal court of cases that are filed in state court, 28 U.S.C.A. § 1441(b) (1993), states as follows:

> § 1441 Actions removable generally
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties . . . .

The jurisdictional provision of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C.A. § 9613(b) (1995), states in pertinent part as follows:

> § 9613(b) Jurisdiction; venue
>
> Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy . . . .

The "timing of review" provision of CERCLA, 42 U.S.C.A. § 9613(h) (1995), states in pertinent part as follows:

> § 9613(h) Timing of review
>
> No Federal court shall have jurisdiction under Federal law other than under section 1332 of title 28 of the United States Code (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under 9606(a) of this title, in any action except one of the following:
>
> * * *
>
> (4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.
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> * * *

The "citizen suit" provision of CERCLA, 42 U.S.C.A. § 9659(a)(1) (1995), states as follows:

§ 9659. Citizens suits

(a) Authority to bring civil actions

Except as provided in subsections (d) and (e) of this section and in section 9613(h) of this title (relating to timing of judicial review), any person may commence a civil action on his own behalf --

(1) against any person (including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter (including any provision of an agreement under section 9620 of this title, relating to Federal facilities) . . . .

* * *

The "savings clause" of the citizen suit provision, 42 U.S.C.A. § 9659(h) (1995), states as follows:

§ 9659(h) Other rights

This chapter does not affect or otherwise impair the rights of any person under Federal, State, or common law, except with respect to the timing of review as provided in section 9613(h) of this title . . . .

STATEMENT OF THE CASE

This case presents a significant and recurring issue under the doctrine of complete preemption, on which the courts of appeals are divided: what kind of federal statutory provision, and what manifestations of congressional intent, are sufficient to find complete preemption? The case also poses an issue that is central to the congressional policy directive, codified in section 9613(h) of CERCLA, 42 U.S.C.A. § 9613(h) (1995), that litigation concerning environmental cleanups must be postponed until after the cleanup is completed: what claims constitute a "challenge" to a cleanup or seek "to review an[ ] order issued under section 9606(a)," within the meaning of section 9613(h), and should that determination be made on the basis of the substance of the claims or the nature of the relief sought?

A. Factual Background

1. *The Parties and The Site.* ARCO is a Delaware corporation engaged in the energy business, including the exploration, production, and marketing of petroleum products. West Side Ditch Company is a Montana corporation, which holds water rights in the Clark Fork River, near Anaconda, Montana. The individual respondents in the *West Side* action are shareholders of West Side and are entitled to receive water from West Side. The respondents in the *Beck* action are individuals who hold water rights in the Clark Fork River.

The Clark Fork River is formed by the conjunction of Silver Bow Creek, Mill Creek, Willow Creek, and Warm Springs Creek.[1] For more than 100 years ARCO's predecessors and other parties were engaged in placer and other mining operations in the Upper Clark Fork River Basin. The parties conducting those operations built smelters, mills, and concentrators along the banks of Silver Bow Creek, and disposed of tailings

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[1] The following summary of facts is based on the findings EPA made in its first administrative order to ARCO, which specifically states that ARCO does not admit, but rather reserves the right to challenge, EPA's factual and legal determinations. ARCO accepted EPA's findings for purposes of its motions to dismiss the *West Side* and *Beck* actions without waiving its right to contest the findings in this or any other proceeding. ARCO summarizes the findings here, again reserving its right to challenge them in the future.

and other mining materials into and along the banks of Silver Bow Creek. Over the years, some of these materials were carried downstream, settling on the beds, along the banks, and in the flood plain of Silver Bow Creek. ARCO currently owns land adjacent to Silver Bow Creek.

Before joining Warm Springs Creek, Silver Bow Creek flows through the Warm Springs Ponds, a series of three successive ponds constructed by ARCO's predecessor-in-interest, The Anaconda Copper Mining Company. Anaconda built ponds 1 and 2 in 1911, and 1916, respectively, to retain the waters of Silver Bow Creek temporarily and treat them. Pond 3 was constructed between 1954 and 1959, and used in the same manner. Anaconda built the Mill-Willow Bypass during 1954 to 1959, to route water from Mill and Willow Creeks around the ponds, and to permit flood flows from Silver Bow Creek to bypass the Warm Springs Ponds. The point of diversion for the *West Side* and *Beck* respondents is downstream from the Mill-Willow Bypass and the ponds, on the Clark Fork River.

2. *EPA Orders and Oversight.* In September 1983, EPA listed the Silver Bow Creek site, designated as the Silver Bow Creek Superfund Site, on the National Priorities List pursuant to section 105 of CERCLA, 42 U.S.C.A. § 9605 (1995). 43 Fed. Reg. 40,658. EPA then entered into a cooperative agreement with the State of Montana, pursuant to which the State conducted appropriate studies for response actions at the site. In the summers of 1988 and 1989, EPA and the State ordered ARCO to route the waters of Mill and Willow Creeks into the Warm Springs Ponds as an interim cleanup measure. ARCO Supp. ER Ex. 5, pp. 258-61, 288-89.[2] ARCO did so until October of each year, when EPA and the State ordered ARCO to stop routing the water. *Id.*, Ex. 5, pp. 260, 267, 288-89.

On July 3, 1990, EPA issued the first of three administrative orders to ARCO pursuant to section 106(a) of CERCLA, 42 U.S.C.A. § 9606(a) (1995). West Side ER Ex. E. As part of an expedited "re-

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[2] The record in the Ninth Circuit is cited as follows: the appendix to the West Side respondents' opening brief is cited as "West Side ER Ex. __" (lettered "A" through "M"), and ARCO's Supplemental Excerpts of Record is cited as "ARCO Supp. ER Ex. __" (numbered "1" through "27").

sponse action,"[3] the order directed ARCO to route the waters of Mill and Willow Creeks into the Warm Springs Ponds in order to facilitate removal of tailings from the Mill-Willow Bypass. *Id.*, Ex. E, pp. 1-2, 10-11; ARCO Supp. ER Ex. 5, p. 296. The order required ARCO to comply "with all applicable or relevant and appropriate requirements and all State requirements in addition to or more stringent than Federal requirements" as set forth in an attachment to the order. West Side ER Ex. E, p. 14. One such requirement cited Mont. Code Ann. §§ 75-7-104, 87-5-506, and stated "[c]leanup actions shall be conducted to prevent the impairment, diminishment, divestment or control of any vested water rights." *Id.*, Att. 2, p. 7, § C.c. ARCO routed the waters until EPA ordered the routing ceased in September of 1990. ARCO Supp. ER Ex. 5, p. 300.

On September 28, 1990, EPA issued a Record of Decision, setting forth the overall remedial actions to be undertaken and implemented at the site. EPA directed that the Warm Springs Ponds would remain in place, that ponds 2 and 3 would be used for treatment "until upstream sources of contamination are cleaned up", that certain steps would be taken to strengthen and improve the ponds for use in this manner, and that ARCO would route waters from the Mill and Willow Creeks into the ponds to facilitate removal of the wastes from the Mill-Willow Bypass. *Id.*, Ex. 10.

In December 1990, West Side Ditch Company filed suit in Montana state court (the "*West Side* action"). West Side claimed that it held senior water rights on the Clark Fork River, that ARCO had negligently diverted water from the Mill-Willow Bypass into the Warm Springs Ponds and reduced the flow available at West Side's diversion point, and that it had been injured by the decline in water. West Side sought declaratory

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[3] "Response action" includes both "removal action" and "remedial action." 42 U.S.C.A. § 9601(25) (1995). "Removal action[s]" are immediate or interim measures that are necessary to prevent, minimize, or mitigate damage to human health or the environment from the release or threatened release of hazardous substances. 42 U.S.C.A. § 9601(23) (1995). "Remedial action[s]" are actions taken instead of or in addition to removal actions, "to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment . . . ." 42 U.S.C.A. § 9601(24) (1995). Remedial actions therefore are part of the long-term or permanent remedy at the site.

and injunctive relief against the diversion of the waters, as well as compensatory damages, costs and attorney's fees.

3. *EPA's Subsequent Orders*. Following the filing of the *West Side* action, EPA amended the section 106 order. EPA found that CERCLA required the continued treatment of Silver Bow Creek, and occasional treatment of Mill and Willow Creeks, and that "treatment must consist of routing Silver Bow Creek, Mill Creek and Willow Creek through" ponds 2 and 3. *Id.*, Ex. 13, pp. 1-2. ARCO therefore has continued to route the flows of Silver Bow Creek into the ponds, and to route Mill and Willow Creeks through the ponds when EPA directs ARCO to do so. *Id.*, Ex. 5, pp. 304, 309-11.

EPA issued a second section 106 order to ARCO on September 25, 1991. This order again directed ARCO to implement remedial actions at the active area, ponds 2 and 3, including the routing and treatment of waters of Silver Bow, Mill and Willow Creeks, and to do so "subject to oversight by and the prior approval of EPA . . . ." *Id.*, Ex. 14, pp. 9, 13; Ex. 11. The order also stated as follows:

> This Order is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation. To insure that implementation of the remedy does not cause injury to vested water rights or decreed conditional water rights, consistent with Montana water law, the respondent shall comply with all applicable provisions of the laws of the State of Montana, consistent with § 121(e)(1) of CERCLA, 42 U.S.C. § 9621(e)(1), and the previous paragraph, before undertaking a remedial action which involves the interception, withdrawal, diversion, storage, capture, possession, or control of any groundwater or surface water. Nothing in this Order, however, shall alter any obligation Respondent may have under state law to provide compensation or payment for the use of water. For that portion of any Work which constitutes actions described in this paragraph performed entirely on-Site, Respondent shall submit to the State, with a copy to EPA and MDHES, timely written notification of such actions.

Id., Ex. 14, p. 25. An attachment to the order stated that "[t]o the extent applicable, any remedial activities at the Warm Springs Ponds active area" must comply with certain specified provisions of the Montana Code Annotated and accompanying regulations. ARCO Supp. ER Ex. 14, Ex. 4, p. 14, § C.1.

The second section 106 order imposed standards for the quality of water discharged from ponds 2 and 3. The standards became progressively more stringent over the next six years. This tiered approach, called a "shakedown," was designed to enable EPA to study the ponds over the course of several years and under different conditions, in order to adopt appropriate treatment standards. *Id.*, Ex. 14, p. 9, Ex. 15, Ex. 16, pp. 4-7. In a third section 106 order issued on June 17, 1993, EPA ordered ARCO to implement remedial actions at the inactive area, pond 1. ARCO Supp. ER Ex. 25.

4. *Compliance With EPA's Orders.* Pursuant to EPA's direction, ARCO requested the Montana Department of Natural Resources and Conservation ("MDNRC") to consider whether the routing of water into the ponds for treatment would constitute an appropriation of water under Montana water law. MDNRC concluded that this was not an appropriation of water, and that therefore a water use permit was not required. *Id.*, Ex. 19; West Side ER Ex. J.[4] EPA subsequently advised ARCO that because the MDNRC had concluded that the routing and treatment of the waters did not require a water use permit, EPA "continue[s] to believe that ARCO is in compliance with State water law as well as in substantial compliance with EPA's Superfund directives for the Active Area Ponds." ARCO Supp. ER Ex. I.

B. Proceedings Below

1. *Federal District Court Proceedings.* West Side Ditch Company filed the first of these two suits in Montana state court in December 1990. Naming ARCO and the Montana Department of Fish, Wildlife and Parks as defendants, West Side claimed that it held senior water rights in the Clark Fork River, and that ARCO had negligently

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[4] For diversions of water other than for treatment, MDNRC required water use permits, ARCO Supp. ER Ex. 19; West Side ER Ex. J, and ARCO subsequently acquired them, ARCO Supp. ER Ex. 20, 21, 22.

diverted water from the Mill-Willow Bypass into the Warm Springs Ponds, thereby decreasing the amount of water in the river at West Side's point of diversion and causing crop losses. West Side sought declaratory and injunctive relief from the diversions, compensatory damages, costs, and attorney's fees. ARCO removed the case to federal district court, on the ground that West Side's prayer for injunctive relief made the case a controversy arising under CERCLA, within the exclusive jurisdiction of the federal district court under section 9613(b).

West Side moved to remand, arguing that it had not pled a federal law claim against ARCO, but rather had pled only a state law negligence claim. ARCO opposed the motion, asserting that removal was proper because West Side's claims sought to enjoin and otherwise interfere with the ongoing response action that EPA had ordered under section 106(a). ARCO argued that regardless of West Side's artful pleading, the claims had been completely preempted by sections 9613(h) and 9659 of CERCLA, and were exclusively federal claims within the federal district court's original federal subject matter jurisdiction.

The United States filed an *amicus curiae* brief in support of removal. The United States argued that to the extent West Side sought to enjoin a response action, section 9613(h) completely preempted the claim. The United States also suggested that West Side's request for compensatory damages, costs, and attorney's fees should be remanded to state court. The federal district court denied the motion to remand. Pet. App. at 10a.

West Side filed a petition for a preliminary injunction under Mont. Code Ann. § 85-2-406 (1989), as well as an amended complaint. The amended complaint added (a) West Side's shareholders as plaintiffs; (b) claims arising from the routing of the Silver Bow Creek, Mill Creek, and Willow Creek to those concerning the routing of the Mill-Willow Bypass; (c) prayers for compensatory damages for all of the plaintiffs, including for alleged crop loss and decline in the value of West Side's stock and real property; and (d) a request for punitive damages.

ARCO moved to dismiss the petition for injunctive relief on grounds that it was barred by section 9613(h). ARCO argued that section 9613(h) deprived the court of jurisdiction over claims, such as West Side's, that are "challenges" to a response action or seek "to review [a section 106] order" during implementation of the response action, and permits such claims to proceed only after the response action is complete. In

response, West Side argued that its request for injunctive relief was consistent with, and sought to enforce, the section 106 orders, which, West Side argued, required ARCO to comply with state water law. West Side also argued that CERCLA did not preempt state water law, and that a contrary ruling would violate West Side's due process rights.

The United States intervened, and also argued that section 9613(h) required dismissal of the request for injunctive relief. The United States asserted that West Side's arguments concerning preemption and due process were groundless: the section 106 orders required compliance with state water law, and CERCLA only reduced West Side's remedies by precluding judicial review of the section 106 orders. As to West Side's prayers for declaratory relief, compensatory and punitive damages, the United States argued that "[t]o the extent that these claims do not challenge or seek to block the response action at the Warm Springs Ponds operable unit, they do not appear to implicate CERCLA." Brief of Intervenor United States in Support of Dismissal of Claims for Injunctive Relief, dated Feb. 21, 1992, at 17. The United States declined to "take a position" on whether West Side was "entitled to some form of relief (such as money damages)", asserting that if West Side's water rights had been injured, "CERCLA does not bar a remedy *unless* that remedy would involve review of the propriety of, or possible injunction against, the performance of an ongoing CERCLA response action." *Id.* at 17-18 (emphasis in original).

West Side replied to the United States' brief, arguing, *inter alia*, that section 9613(h) did not preclude jurisdiction because that section authorized a federal court to resolve claims "under state law which is applicable or relevant and appropriate," 42 U.S.C.A. § 9613(h), or claims based on diversity of citizenship, and that its claims fell within either of these categories. In response, the United States and ARCO demonstrated that the phrase "under state law which is applicable or relevant and appropriate" is not an exception to the jurisdictional bar of section 9613(h), but instead, is a withdrawal of jurisdiction parallel to the initial withdrawal of jurisdiction in section 9613(h), *i.e.*, the withdrawal of jurisdiction "under Federal law." *See* § 9613(h). The United States and ARCO also showed that section 9613(h)'s reference to diversity jurisdiction was not intended to create an additional opportunity to obtain judicial review of a response action and, in any event, that West Side's joinder of a state agency as a defendant destroyed complete diversity.

Before the federal district court decided the motion, ARCO moved to dismiss the remaining portions of the claims, *i.e.*, to the extent West Side sought compensatory and punitive damages, on grounds that because ARCO's activities were all undertaken in compliance with EPA's orders, West Side's exclusive remedy was a claim against the United States for taking of the property without just compensation. ARCO also argued that even if West Side's requests for damages against ARCO were cognizable, section 9613(h) barred judicial review until after the response action was completed.

Meanwhile, in April 1992, Thomas Beck, Melvin Beck and Robert Evans filed a second lawsuit in Montana state court. They too claimed that ARCO had interfered with their water rights by diverting water from the Mill-Willow Bypass, Silver Creek, Mill Creek, Willow Creek, and other sources, in violation of Montana law. Omitting a prayer for injunctive relief, they sought compensatory and punitive damages, costs, and attorney's fees. ARCO removed the case to federal district court on grounds that federal subject matter jurisdiction existed under 28 U.S.C.A. § 1441. The *Beck* respondents filed a motion to remand; ARCO opposed the motion on the ground that the claims had been artfully pled to avoid federal subject matter jurisdiction. ARCO also moved to dismiss on the ground (also raised in its motion to dismiss the *West Side* action) that the *Beck* respondents' exclusive remedy was an action against the United States for inverse condemnation. The federal district court did not rule on the motion to remand, but consolidated the *West Side* and *Beck* actions for briefing and argument concerning ARCO's motions to dismiss.

The federal district court granted ARCO's motions to dismiss the *West Side* action in December 1993. Pet. App. at 11a-19a. The court held that section 9613(h) deprived the court of jurisdiction over West Side's petition for injunctive relief and required dismissal of that request. *Id.* at 14a-16a. As for West Side's request for damages, the court found that it was "beyond dispute that ARCO's actions were CERCLA response actions selected and ordered by the EPA." *Id.* at 17a. West Side's sole remedy therefore was an action for inverse condemnation against the United States. *Id.* at 16a-18a. The court held that to the extent West Side alleged that ARCO had not acted in accordance with EPA's orders, West Side's only remedy under CERCLA was a citizen suit under section 9659(a)(1) to enforce EPA's orders. *Id.* at 18a. Such a suit, however, was subject to section 9613(h) and therefore barred until the response action was complete. *Id.* The court subsequently entered an order granting ARCO's

motion to dismiss the *Beck* action on the grounds set forth in its order in the *West Side* action, *id.* at 20a, and denied all motions for reconsideration, *id.* at 21a-22a.

2. *Ninth Circuit Proceedings*. The court of appeals reversed, and remanded with directions to remand the cases to state court. Pet. App. at 1a-6a. The court reasoned that even if respondents had a claim for inverse condemnation against the United States, they had not pled such a claim, and could not be compelled to do so. *Id.* at 4a. The court held that even if respondents had "a takings claim against the United States for diversion of water by ARCO in conformity with the terms of the EPA order," that fact "would not in itself preclude [respondents] from having a state law claim against ARCO for diversion other than in conformity with the EPA's order." *Id.* at 4a-5a.

The court held that section 9613(h) did not apply to respondents' requests for compensatory and punitive damages. *Id.* at 5a. The court overlooked the text of section 9613(h), which states that "[n]o federal court shall have jurisdiction . . . .," and did not consider the consequences that directive might have for the analysis of federal subject matter jurisdiction. The court also did not recognize that section 9613(h), by its terms, withdraws jurisdiction "to review any challenges to removal or remedial action selected under section 9604 . . . *or* to review any order issued under section 9606(a)," § 9613(h) (emphasis added).

The court held that respondents' "damage claim does not 'challenge' the CERCLA plan and is thus unaffected by CERCLA's provision limiting such challenges, 42 U.S.C. § 9613(h)." Pet. App. at 5a. The court reasoned that although respondents' claims "may require an examination of the EPA orders", the claims could be resolved without altering the terms of the orders. *Id.* The court noted that ARCO could defend itself by showing that it had complied with EPA's orders, but that "is a question of fact, not of jurisdiction." *Id.* at 5a n.7. The court stated that a decision in respondents' favor would entitle them to compensation for lost crops and lost profits, which "would not interfere with ARCO's implementation of the cleanup" and therefore would not constitute a challenge. *Id.* at 5a-6a. Finally, the court of appeals noted that respondents were not restricted to the citizen's suit remedy afforded in section 9659(a)(1), pointing out that sections 9652(d) and 9659(h) of CERCLA, 42 U.S.C.A. §§ 9652(d), 9659(h) (1995), had preserved respondents' right to pursue state law remedies. *Id.* at 5a n.8.

Respondents in the *West Side* action chose not to appeal from the district court's order dismissing their request for injunctive relief. *Id.* at 2a n.3. The court of appeals nonetheless reviewed that ruling and affirmed it. The court, without explanation or analysis, held that the request for injunctive relief did constitute a "challenge" to the CERCLA response action and therefore could not be litigated until after the cleanup was completed.

The Ninth Circuit denied ARCO's petition for rehearing and suggestion for rehearing *en banc*, but granted ARCO's motion to stay issuance of the mandate pending the filing of this petition.

REASONS FOR GRANTING THE PETITION

This case presents a fundamental, recurring issue under the doctrine of complete preemption -- what kind of federal statutory provision, and what indicia of congressional intent, are sufficient to find that the federal statute completely preempts state law claims and makes them removable to federal court? The Third, Fifth, and Sixth Circuits, on the one hand, and Seventh and Eighth Circuits, on the other, apply different tests, each of which would confirm that complete preemption is present in this case. Here, sections 9659(a)(1) and 9659(h) displace state law actions questioning the validity of a response action or seeking review of a section 106 order during implementation -- and both the text of sections 9659(a)(1), 9659(h), 9613(b), and 9613(h), and the legislative history of section 9613(h), confirm that Congress intended that such state law actions would be removable to federal court.

This case also raises the significant issue of what claims constitute a "challenge" to a response action or seek "review" of a section 106 order within the meaning of section 9613(h) and are therefore subject to the jurisdictional bar that provision imposes during implementation of a response action. The Ninth Circuit's view -- that the relief sought, not the substance of the claim, is determinative and must involve altering the order or threaten actual interference with the response action -- conflicts with decisions of other circuit courts. In addition, the Ninth Circuit's conclusion that a judgment for compensatory and punitive damages would not threaten such interference conflicts with this Court's recognition, in other contexts, that a damages judgment could require a defendant to change its conduct to avoid future liability.

The Ninth Circuit's decision has enormous consequences for the effective administration and enforcement of CERCLA, and for Congress' efforts to assure that litigation does not interfere with such enforcement. The decision creates a significant, judicially-crafted exception under section 9613(h), the cornerstone of Congress' "clean up now, litigate later" policy. The exception permits litigation to go forward, so long as it is brought in state court under state law, and requests compensatory and punitive damages, not injunctive relief. A state-court jury can thereby second-guess EPA's response actions and subject a potentially responsible party to the risk of inconsistent and irreconcilable interpretations of EPA's orders, jeopardizing both that party's ability to continue its compliance and EPA's overriding goal of mitigating risks to human health and the environment. Yet under the Ninth Circuit's reading, a federal district court is powerless to hear the very same controversy if the plaintiff seeks to enjoin the response action. Because these startling consequences highlight significant conflicts among the circuit courts and threaten to undermine a major federal environmental program, the decision merits review.

I.

1. The Ninth Circuit's decision to remand these cases to state court based on the "well-pleaded complaint rule" overlooks the complete preemption doctrine and underscores the conflicts among the courts of appeals in applying that doctrine. Under the well-pleaded complaint rule, federal question jurisdiction exists only when an issue of federal law is raised on the face of the properly pled complaint. *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10-11 (1983). "One corollary of the well-pleaded complaint rule developed in the case law, however, is that Congress may so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987). If an area of state law is completely preempted, then "any claim purportedly based on that preempted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987). This Court has found complete preemption where the federal statute at issue (1) "displace[d] entirely any state cause of action" within the scope of the federal statutory provision, *Franchise Tax Bd.*, 463 U.S. at 23-24 (interpreting *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 560 (1968)); and (2) contained a clear statement of congressional intent, either in statutory text or in legislative history, to permit removal, *Taylor*, 481 U.S. at 64-67.

2. The Third, Fifth and Sixth Circuits, and the Seventh and Eighth Circuits, have fashioned different tests for determining whether a federal statutory provision satisfies the first of these prerequisites. In the Third Circuit, the federal statute at issue must "create a statutory cause of action vindicating the same interest that the [plaintiff's] state causes of action seek to vindicate . . . ." *Goepel v. National Postal Mail Handlers Union*, 36 F.3d 306, 313 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1691 (1995); *Railway Labor Executives Ass'n v. Pittsburgh & Lake Erie R. Co.*, 858 F.2d 936, 942 (3d Cir. 1988) (the complete preemption doctrine "has never been applied in a situation where there was no federal cause of action comparable to the state cause of action asserted by the plaintiff"). The Fifth and Sixth Circuits agree that a federal cause of action that supersedes the state cause of action is an essential prerequisite to a finding of complete preemption. *Aaron v. National Union Fire Ins. Co.*, 876 F.2d 1157, 1164-65 (5th Cir. 1989), *cert. denied*, 493 U.S. 1074 (1990); *Warner v. Ford Motor Co.*, 46 F.3d 531, 534 (6th Cir. 1995) (*en banc*).

By contrast, the Seventh Circuit has squarely rejected the proposition that the federal statute must "actually substitute[ ] federal substantive law (and a federal cause of action) for a state law (and state cause of action)." *Rice v. Panchal*, 65 F.3d 637, 640 (7th Cir. 1995). In the Seventh Circuit's view, "a federal remedy -- no matter how limited" is all that is required by this prong of the doctrine. *Id.* at 641. The Eighth Circuit has termed the Third Circuit's rule as "unnecessarily narrow" and has held that the Railway Labor Act, which affords mandatory administrative grievance procedures for "minor" railway labor disputes with limited judicial review in the federal courts, completely preempts state law causes of action for such disputes. *Deford v. Soo Line R. Co.*, 867 F.2d 1080, 1086, 1085-86 (8th Cir.), *cert. denied*, 492 U.S. 927 (1989).

3. Here, the Ninth Circuit's decision is especially worthy of this Court's review because its analysis of respondents' claims permits the Court to consider both of these competing tests of the other circuit courts. First, the Ninth Circuit's conclusion that respondents had viable "*state law* claim[s] against ARCO for diversion other than in conformity with the EPA's order", Pet. App. at 5a (emphasis added), fails to consider that section 9659(a)(1) provides a federal cause of action vindicating the very interests that these purported state law claims seek to protect. *See* § 9659(a)(1) (affording private cause of action to "any person" who claims that a party "is in violation of any standard, regulation, condition, require-

ment or order which has become effective pursuant to this chapter"). *Goepel*, 36 F.3d at 313, 315.[5] Thus, section 9659(a)(1) would satisfy the test adopted by the Third, Fifth and Sixth Circuits, and the Ninth Circuit's decision to remand gives this Court the opportunity to evaluate the rule in these circuits.

Second, the Ninth Circuit's decision also can be read to hold that respondents' claims do not fall within section 9659(a)(1), but instead, are state law claims preserved by section 9659(h). *See* Pet. App. at 5a n.8 (noting that a citizen suit under section 9659(a)(1) is not respondents' sole remedy and that sections 9652(d) and 9659(h) preserve state law remedies). *But see supra* at 16 n.5.[6] However, section 9659(h) does not preserve state law claims in their entirety; rather, it expressly subjects those claims to the restrictions of section 9613(h). *See* § 9659(h) (chapter does not affect state law claims "*except with respect* to the timing of review as provided in section 9613(h) . . . .") (emphasis added). Properly understood, section 9659(h) in fact modifies or alters the state law claims that fall

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[5] The Ninth Circuit's analysis also fails to recognize that the EPA orders had incorporated by reference the requirements of state water law, *see supra* at 6, 7, 8, and may therefore have converted any issues concerning compliance with state water law into issues of federal law. *See Arkansas v. Oklahoma*, 112 S. Ct. 1046, 1058-59 (1992). Under this analysis, respondent's claims for violation of state water law were in fact claims for violation of the provisions of the section 106 orders that required compliance with state water law and therefore fell within section 9659(a)(1).

[6] The Ninth Circuit erred in relying on section 9652(d). That provision, by its terms, states that CERCLA does not affect or modify "the obligations or liabilities of any person under other Federal or State law . . . with respect to releases of hazardous substances or other pollutants or contaminants," 42 U.S.C.A. § 9652(d) (1995). Respondents did not plead any such state law claims here. Even if respondents' claims could be so characterized, they would still fall within section 9659(h) and be completely preempted for the reasons stated in the text. *See International Paper Co. v. Ouellette*, 976 U.S. 481, 492-94 (1987) (declining to interpret "a general saving clause" in a manner that would "undermine [a] carefully drawn statute . . . ."). *Accord Razore v. Tulalip Tribes of Washington*, 66 F.3d 236, 240 (9th Cir. 1995).

within its scope by imposing substantive limitations on when and where they can be brought, and the relief they can afford. *See infra* at 18, 19, 21, 22, 23 (explaining impact of section 9613(h)). Hence, section 9659(h) is the kind of statutory provision that satisfies the test applied by the Seventh and Eighth Circuits -- section 9659(h) does not fully replace the state cause of action but rather, displaces it and furnishes a modified, federal remedy in its place. *Rice*, 65 F.3d at 640; *Deford*, 867 F.2d at 1085. Thus, this aspect of the Ninth Circuit's analysis permits the Court to consider the rules adopted by the Seventh and Eighth Circuits.

4. The courts of appeals also are divided on what indicia of congressional intent are sufficient to satisfy the second prong of the complete preemption doctrine. The Third Circuit requires "affirmative evidence in the [federal statute] or its legislative history that Congress intended state claims of this kind to be removable." *Railway Labor*, 858 F.2d at 942. The Eighth Circuit, by contrast, holds that the complete preemption doctrine requires not only consideration of "affirmative congressional intent and civil enforcement provisions, but . . . also [of] . . . the history and purpose of the statute . . . . [and] [r]ecent case law illustrating the federal nature of the statute and analogous statutes with complete preemptive powers . . . ." *Deford*, 867 F.2d at 1086. Applying these differing tests to the text and legislative history of the Railway Labor Act, the Third Circuit concluded that Congress did not intend to permit removal of state law claims challenging the sale of a railroad's assets, *Railway Labor*, 858 F.2d at 942, while the Eighth Circuit held that Congress did have such intent, *Deford*, 867 F.2d at 1085-86.

The Ninth Circuit's decision to remand in this case conflicts with both of these lines of authority because the requisite evidence of congressional intent to permit removal is present under CERCLA, regardless of which test is applied and regardless of whether respondents' claims are viewed as falling within section 9659(a)(1) or section 9659(h). For claims falling within section 9659(a)(1), Congress granted federal district courts exclusive original subject matter jurisdiction. 42 U.S.C.A. § 9613(b). Such exclusive jurisdiction plainly constitutes an expression of intent to permit removal of claims filed in state court that fall within the scope of section 9659(a)(1). *Rosciszewski v. Arete Associates Inc.*, 1 F.3d 225, 232 (4th Cir. 1993). *See also infra* at 19 (legislative history of section 9613(h), reflecting Congress' intent as to section 9613(b)).

Congress also intended that state law claims within the scope of section 9659(h) would be removable to federal district court. In section 9659(h), Congress provided that state law claims were preserved "except with respect to the timing of review as set forth in section 9613(h) . . . .," § 9659(h), while in section 9613(h), Congress stated that "[n]o *federal* court shall have jurisdiction . . ." to review the specific categories of claims identified in that provision, § 9613(h) (emphasis added). Thus, taken together, these two statutory provisions state Congress' intent to make claims that fall within section 9659(h) removable to federal court for scrutiny under section 9613(h). By stating that section 9659(h) claims are subject to section 9613(h) and by stipulating in section 9613(h) that "[n]o federal court shall have jurisdiction . . .," Congress necessarily meant that section 9659(h) claims are removable to federal court. Any other interpretation would render meaningless Congress' express directive, in section 9659(h), that such claims cannot be brought unless they pass scrutiny under section 9613(h).

The legislative history of section 9613(h) confirms this reading. Congress was concerned that any litigation before or during implementation of a cleanup -- regardless of where suit was brought -- would delay and impair the cleanup:

> This amendment is to expressly recognize that pre-enforcement review would be a significant obstacle to the implementation of response actions and the use of administrative orders. Pre-enforcement review would lead to considerable delay in providing cleanups, would increase response costs, and would discourage settlements and voluntary cleanups.

S. Rep. No. 11, 99th Cong., 1st Sess. 58 (1985). *Accord* H.R. Rep. No. 253(V), 99th Cong., 1st Sess. 25 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 3148. The legislative history does not suggest that Congress intended to permit pre-enforcement review so long as suit was brought in state court; rather, the history shows that Congress intended that all such suits -- whether filed in federal or state court -- would be precluded unless they survived scrutiny under section 9613(h). As Senator Thurmond, the chairman of the Senate Judiciary Committee, and Representative Glickman, a member of the House Judiciary Committee, explained:

> The timing of review section is intended to be comprehensive. It covers *all lawsuits, under any authority*, concerning the response actions that are performed by the EPA . . . . The section also covers all issues that could be construed as a challenge to the response, and limits those challenges to the opportunities specifically set forth in the section . . . .

132 Cong. Rec. S14929 (daily ed. Oct. 3, 1986) (Sen. Thurmond) (emphasis added); *accord* 132 Cong. Rec. H9582 (daily ed. Oct. 8, 1986) (Rep. Glickman). Their remarks leave no doubt that Congress specifically intended that any such suits filed in state court would be removable to federal court:

> . . . the reference [in section 9613(h)] to "Federal court" is simply to recognize that except for review of regulations, Federal district courts have exclusive jurisdiction over all controversies under CERCLA. Therefore, *any controversy over a response action selected by the President, whether it arises under Federal or State law, may be heard only in Federal court*, and only under circumstances provided in this section.

132 Cong. Rec. S14929 (Sen. Thurmond) (emphasis added); *accord* 132 Cong. Rec. H9583 (daily ed. Oct. 8, 1986) (Rep. Glickman). Senator Simpson, a member of the Committee of Conference, confirmed that Senator Thurmond's interpretation of section 9613(h) "is certainly in conformity with the intention of the conferees on this bill." 132 Cong. Rec. S14929 (daily ed. Oct. 3, 1986) (Sen. Simpson). This history shows that by subjecting state law claims within the scope of section 9659(h) to section 9613(h), Congress intended to confirm that such suits would be removable to federal court.

5. The Ninth Circuit's decision also conflicts with this Court's decisions concerning the complete preemption doctrine. Once again, these conflicts are present regardless whether respondents' claims are viewed as falling within the scope of section 9659(a)(1) or the scope of section 9659(h).

To the extent that respondents' claims fall within section 9659(a)(1), *see supra* at 15-16 & n.5, the Ninth Circuit's decision to

remand them to state court squarely conflicts with *Metropolitan Ins. Co. v. Taylor*, 481 U.S. 58 (1987). There, this Court held that the civil enforcement provision of ERISA, 29 U.S.C.A. § 1132(a)(1)(B) (Supp. 1995), completely preempted a state law claim that fell within the scope of the civil enforcement provision, because (a) that provision provided a federal cause of action that vindicated the same interest as that protected by the state law claim; (b) the grant of federal subject matter jurisdiction over claims brought under the civil enforcement provision was analogous to that found in the Labor-Management Relations Act; and (c) the legislative history of the civil enforcement provision confirmed Congress' intent that state law claims falling within its scope would be removable. *Taylor*, 481 U.S. at 64-66. Here, to the extent that respondents' claims are really section 9659(a)(1) claims, *see supra* at 15-16 & n.5, each of these requirements is met, *see supra* at 15-16, 17, 19.[7] The Ninth Circuit's decision to remand therefore conflicts with *Taylor*.

To the extent that respondents' claims fall within the scope of section 9659(h), *see supra* at 16-17, the Ninth Circuit's decision conflicts with both *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968) and *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987), as to the first prong of the complete preemption doctrine, and with *Taylor*, 481 U.S. at 65-66, as to the second prong. In *Avco*, the Court held that section 301 of the Labor-Management Relations Act, 29 U.S.C.A. § 185(a) (1978), completely preempted the plaintiff's state law claims even though the federal cause of action furnished by section 301 did not fully replace the state law claims, but rather limited the nature of the relief that could be obtained. 390 U.S. at 560-61. *Accord Caterpillar*, 482 U.S. at 391 n.4 (rejecting court of appeals' reasoning that federal law must "'both displace[ ] and supplement[ ] state law'," on grounds that such reasoning was inconsistent with *Avco*) (citation omitted). Here, claims within the scope of section 9659(h)

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[7] In fact, the case for removal is stronger here because section 9613(b) confers *exclusive* subject matter jurisdiction on federal courts, while the jurisdictional provisions in the LMRA and ERISA are not, by their terms, exclusive. *See Taylor*, 481 U.S. at 65; *Avco*, 390 U.S. at 560 & n.2. *Accord* 132 Cong. Rec. S14929 and H9583 (explaining that section 9613(b)'s grant of exclusive jurisdiction to federal district courts confirms Congress' intent that "any controversy over a response action . . . whether . . . under Federal or State law, may be heard only in Federal court . . . .").

are modified in an analogous fashion because they are expressly subject to section 9613(h)'s restrictions on the timing of suit. Those restrictions, in turn, could well foreclose the remedies available to the plaintiff in the same manner as the federal statute at issue in *Avco*. *See* Pet. App. at 6a (Ninth Circuit concluding that section 9613(h) barred *West Side* respondents' request for injunctive relief). *See also Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1022 (3d Cir. 1991) (acknowledging that "post clean-up review is likely to be inadequate to redress harm that occurred . . . during the EPA's clean-up").

In *Taylor*, the Court found the requisite congressional intent to permit removal in the legislative history of ERISA. 481 U.S. at 65-66. Here, the statements of Senator Thurmond and Representative Glickman, confirmed to be the view of the conference committee -- "any controversy over a response action . . . whether it arises under Federal or State law, may be heard only in Federal court" -- together with the text of sections 9659(h), 9613(h) and 9613(b), *see supra* at 18-19, surely satisfy the *Taylor* standard.

6. The Court should address these conflicts. The competing tests adopted by other circuits undoubtedly support a finding of complete preemption in this case. While the Court has articulated a test for complete preemption under the LMRA and ERISA, it has not done so in the context of other federal statutes. The courts of appeals agree that complete preemption is not necessarily limited to the LMRA and ERISA, but disagree as to how the tests fashioned under those statutes should be applied under other statutes. *See supra* at 15, 17.

This Court's review also is warranted because the Ninth Circuit's decision threatens to undermine one of the most basic policies of CERCLA, *i.e.*, in general, litigation must be postponed until after response actions are completed. The Ninth Circuit's ruling contradicts Congress' express directive -- in both the statutory text and its legislative history -- that this mandate cannot be avoided by the artifice of pleading the complaint under state law and filing it in state court.

II.

1. The remaining inquiry before concluding that respondents' claims are completely preempted is whether the claims constitute "challenges" to a response action or seek "to review [a section 106] order"

within the meaning of Section 9613(h). The Ninth Circuit's holding that respondents' claims for compensatory and punitive damages do not constitute "challenges" to a response action within the meaning of section 9613(h), Pet. App. at 5a, also highlights a conflict among the circuits. Under the Ninth Circuit's ruling, only claims that seek relief that would involve alteration of the EPA order or actually interfere with implementation of the response action constitute a "challenge," and claims for compensatory and punitive damages do not have this effect. Pet. App. at 5a. The Tenth Circuit has adopted a similar restriction, holding that a state's effort to enforce its EPA-delegated authority under the Resource Conservation and Recovery Act, 42 U.S.C.A. § 6926(b) (1995), was not a "challenge" because the suit did "not seek to halt" the CERCLA response action or "to delay the cleanup, but merely . . . to ensure that the cleanup [was] in accordance with state laws which the EPA has authorized [the state] to enforce . . . ." *United States v. State of Colorado*, 990 F.2d 1565, 1576 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994).

By contrast, the First Circuit has held that section 9613(h) applies to "claims that EPA did not 'select[ ]' the proper 'removal or remedial action', in light of the standards and constraints established by the CERCLA statutes." *Reardon v. United States*, 947 F.2d 1509, 1514 (1st Cir. 1991) (*en banc*). Phrased differently, a "challenge" within the meaning of section 9613(h) "concern[s] the merits of any particular removal or remedial action." *Id. Accord Schalk v. Reilly*, 900 F.2d 1091, 1097 (7th Cir.) (claims that question the remedy EPA has selected are a "challenge", as are claims that would "impact the implementation of the remedy and result in the same delays Congress sought to avoid by passage of the statute"), *cert. denied*, 498 U.S. 981 (1990). *See also Razore v. Tulalip Tribes of Washington*, 66 F.3d 236, 239 (9th Cir. 1995) ("[a]n action constitutes a challenge if it is related to the goals of the cleanup"). Unlike the Tenth Circuit in *State of Colorado* and the Ninth Circuit in this case, the Fifth Circuit has expressly refused to graft additional limitations onto the language of the statute. Rejecting the notion that a "challenge" exists "only . . . when a delay in cleanup would ensue," the Fifth Circuit has held that section 9613(h) precludes judicial review of EPA's enforcement activities and response actions unless one of the section 9613(h) exceptions applies. *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380, 1388-89 (5th Cir. 1989). *Accord* 132 Cong. Rec. S14929 and H9582 ("The section [9613(h)] . . . covers *all* issues that could be construed as a challenge . . . .") (emphasis added) (quoted *supra* at 19).

Had the Ninth Circuit applied the tests of these circuits, it would have concluded that respondents' claims do "challenge" the response action EPA has selected. Respondents' claims arise from and are based on the routing and treatment of the Mill-Willow Bypass and the waters of Silver Bow Creek, which are integral parts of the response action EPA has selected. Respondents assert that these activities are wrongful and warrant the imposition of compensatory and punitive damages against ARCO. Thus, the claims question the remedy EPA has selected, *Schalk*, 900 F.2d at 1097, and "concern the merits of [this] particular removal or remedial action", *Reardon*, 947 F.2d at 1514. Respondents' claims therefore constitute a "challenge" under other circuit courts' interpretation of section 9613(h).

2. The Ninth Circuit did not specifically address the second prong of section 9613(h), which prohibits "review [of] any order issued under section 9606(a) . . . ." However, the Ninth Circuit held that section 9613(h) did not bar the claims because although they "may require an examination of the EPA orders," the claims could be resolved without altering the orders. Pet. App. at 5a. This ruling conflicts with the plain language of section 9613(h), which precludes "review [of] any [section 106] order" without regard to whether review would involve altering the order. As the Seventh Circuit has held, section 9613(h) "postpones *all* judicial review of administrative orders under [section 9606(a)] until the work has been performed or the EPA itself applies for judicial enforcement." *Matter of CMC Heartland Partners*, 966 F.2d 1143, 1148 (7th Cir. 1992) (emphasis added).

Thus, under the Seventh Circuit's test, respondents' claims in this case are barred because they request review of key provisions of the section 106 orders, *i.e.*, the routing and treatment of the water, as well as review of EPA's construction of those orders, *i.e.*, that ARCO is in compliance with them. *See supra* at 8. The Ninth Circuit's holding that respondents' claims require proof that ARCO did not route and treat the water "in conformity with the EPA's order," Pet. App. at 5a, confirms this conclusion. A determination of whether ARCO has complied with the EPA orders necessarily requires an assessment of what the orders require -- in other words, it requires a "review" of the orders.

3. Even if the Ninth Circuit were correct in concluding that a claim is not a challenge unless the relief sought would involve altering the EPA order or would interfere with the cleanup, the Ninth Circuit's

conclusion that requests for compensatory and punitive damages do not have this effect, Pet. App. at 5a, squarely conflicts with this Court's decision in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987). There, the Court expressly recognized that if the plaintiffs in a state law nuisance case "were entitled to the full amount of *damages* and injunctive relief sought in the complaint, at a minimum [the defendant] would have to change its methods of doing business and controlling pollution to avoid the threat of ongoing liability." Id. at 495 (emphasis added). *See also id.* at 498 n.19 (noting that a judgment for compensatory damages "might [ ] compel[ ] [the defendant] to adopt different or additional means of pollution control from those required by the Act . . . ."). *Accord San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) ("Such [state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy"). So too here, if ARCO were held liable for compensatory and punitive damages, ARCO would have to change its conduct -- cease implementing the response action EPA has ordered -- to avoid an ongoing future liability.[8] Indeed, the whole purpose of an award of punitive damages is to deter the offending conduct in the future. Such a result would threaten to alter the section 106 orders and would interfere with the cleanup.

4. The Ninth Circuit's interpretation of section 9613(h) warrants this Court's review. The Ninth Circuit has crafted a novel, unprecedented approach to section 9613(h), which creates a gaping loophole in the statute and conflicts with Congress' express intent to preclude all

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[8] The question whether ARCO could purchase water rights senior to the respondents' rights, *see* Pet. App. at 5a n.6, cannot be answered at this time. Montana is currently adjudicating the water rights in the Clark Fork River Basin, *see* Mont. Code Ann. §§ 85-2-211 *et seq.*, and one cannot ascertain what water rights are in fact senior to respondents' asserted rights. Even if ARCO could identify and purchase such a water right, there is no assurance that the right could be used to offset any alleged depletions arising from the routing and treatment of water. Changes to diversion points, place of water usage, and purposes of water use require the permission of the Montana Department of Natural Resources and Conservation, Mont. Code Ann. § 85-2-402, and proceedings to obtain such permission last a year or more.

pre-cleanup challenges to response actions and review of section 106 orders except in narrow specified circumstances that are not present here. The Ninth Circuit's decision is especially problematic because it permits third parties to resort to state courts in an effort to second-guess the decisions of EPA concerning the nature, scope, and timing of a cleanup.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 28, 1996

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APPENDIX A

Thomas A. BECK; Melvin R. Beck; Robert Evans,
Plaintiffs-Appellants,

v.

ATLANTIC RICHFIELD COMPANY, a Delaware Corporation; and The Montana Department of Fish, Wildlife and Parks,
Defendants-Appellees.

Thomas A. BECK; Melvin R. Beck; Robert Evans,
Plaintiffs-Appellees,

v.

ATLANTIC RICHFIELD COMPANY, *Defendant-Appellant*.

WEST SIDE DITCH COMPANY, a Montana Corporation; City of Deer Lodge; Ronald Kelly; Jerry Rutledge; Charles Beck; Richard Forson; George Reistad, *Plaintiffs-Appellants*,

United States Environmental Protection Agency, *Intervenor-Appellee*,

v.

ATLANTIC RICHFIELD COMPANY, a Delaware Corporation; Montana Department of Fish, Wildlife and Parks, *Defendants-Appellees*.

WEST SIDE DITCH COMPANY, a Montana Corporation; City of Deer Lodge; Ronald Kelly; Jerry Rutledge; Charles Beck; Richard Forson; George Reistad, *Plaintiffs-Appellees*,

v.

ATLANTIC RICHFIELD COMPANY, a Delaware Corporation,
Defendant-Appellant.

Nos. 94-35487, 94-35551, 94-35539 and 94-35552.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted June 6, 1995.

Decided Aug. 17, 1995.

Appeal from the United States District Court for the District of Montana.

Before: BROWNING, WRIGHT, and T.G. NELSON, Circuit Judges.

PER CURIAM:

A group of water users along the Clark Fork River in southeastern Montana[1] appeal the dismissal without prejudice of their claim under Montana law against Atlantic Richfield Company ("ARCO") for compensatory damages for diversion of water from the River. ARCO cross-appeals because the dismissal was without prejudice. We reverse the dismissal and order the district court to remand the case to state court.

I.

ARCO's corporate predecessor discharged mining wastes into the Clark Fork River for many years. The United States Environmental Protection Agency ("EPA") ordered ARCO to clean up the resulting contamination pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq*. To implement the cleanup, the EPA ordered ARCO to divert the water into tailing ponds where the waste could settle to the bottom, allowing cleaner water to flow back into the River. The order specified that ARCO was not to cause any injury to vested water rights, and that the order did not alter any obligation ARCO might have to pay for use of the water.[2]

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[1]The plaintiffs are Thomas A. Beck, Melvin R. Beck, and Robert Evans ("Beck") and West Side Ditch Company, City of Deer Lodge, Ronald Kelly, Jerry Rutledge, Charles Beck, Richard Forson, and George Reistad ("West Side").

[2]The order provided:

(continued...)

Plaintiffs contend the diversion diminished the amount of water available to downstream users. They filed suit in state court alleging ARCO illegally and negligently appropriated water from the River in derogation of their senior water rights, and seeking compensatory damages for crop loss, lost profits, and property devaluation. West Side also sought an injunction.[3] ARCO removed to federal court and moved to dismiss.

The district court held plaintiffs' claim against ARCO for damages constituted a claim against the United States for inverse condemnation over which the Court of Federal Claims had exclusive jurisdiction.[4] Alterna-

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[2](...continued)

> To ensure that implementation of the remedy does not cause injury to vested water rights . . . [ARCO] shall comply with all applicable provisions of the laws of the State of Montana . . . before undertaking any remedial action which involves the interception, withdrawal, diversion, storage, capture, possession, or control of any ground water or surface water. Nothing in this Order, however, shall alter any obligation [ARCO] may have under state law to provide compensation or payment for the use of water.

[3] The EPA intervened in the *West Side* case because the request to enjoin the diversions implicated federal interests under CERCLA, but supported plaintiffs' right to pursue state law damage claims against ARCO. The district court held West Side's request to enjoin the diversions "challenged" the CERCLA cleanup and was therefore barred by the "timing of review" statute, 42 U.S.C. § 9613(h). West Side does not appeal that ruling.

The plaintiffs also named the Montana Department of Fish, Wildlife, and Parks ("the Department") as a defendant based on the Department's alleged diversion of water into wildlife ponds. The district court's order does not mention the Department and the Department did not appear in this appeal.

[4]The parties dispute whether the district court dismissed the damage claims for failure to state a claim, which was converted into a summary judgment by the consideration of materials outside the complaint, or for

(continued...)

tively, the district court held that, to the extent plaintiffs alleged ARCO had violated the EPA's order by injuring plaintiffs' water rights, plaintiffs' claim constituted a "challenge" to the cleanup and was therefore barred by CERCLA's "timing of review" provision, 42 U.S.C. § 9613(h).

We conclude from our examination of the complaint that plaintiffs do not assert a claim for inverse condemnation, nor a "challenge" to the cleanup effort. Rather, plaintiffs seek to recover damages under Montana law for violation of their water rights, a claim over which the district court lacks jurisdiction.

II.

[1] Plaintiffs do not allege a takings claim. They expressly allege a cause of action based purely on state law. Even if "[t]he facts stated also [might] have sustained a [takings] claim . . . had [the plaintiffs] elected that remedy, . . . [they] did not do so, and [they] cannot be compelled to do so." *Koratron Co. v. Deering Milliken, Inc.*, 418 F.2d 1314, 1317-18 (9th Cir. 1969).[5] Contrary to the district court's assumption, the

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[4](...continued)
lack of subject matter jurisdiction. We conclude the district court dismissed the damage claims for lack of subject matter jurisdiction. The district court determined the Court of Federal Claims had jurisdiction over the damage claims under the Tucker Act, which is a jurisdictional statute. *United States v. Testan*, 424 U.S. 392, 398, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976). The court offered to transfer the damage claims to the Court of Federal Claims pursuant to 28 U.S.C. § 1631, which allows a transfer when the "court finds that there is a want of jurisdiction." *See Rowe v. United States*, 633 F.2d 799, 800-02 (9th Cir. 1980) (treating issue of whether complaint should be read as raising a Tucker Act claim as a question of jurisdiction).

[5]Our decision is consistent with *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312 (9th Cir. 1989). There, we held "[t]he availability of a Tucker Act remedy [for inverse condemnation] is presumed on a showing that the challenged action was authorized and for a public use." *Id.* at 1317. However, the availability of a Tucker Act remedy is not at issue here; instead, we are called upon to determine whether the plaintiffs alleged such a cause of action.

fact that plaintiffs might have a takings claim against the United States for diversion of water by ARCO in conformity with the terms of the EPA's order would not in itself preclude plaintiffs from having a state law claim against ARCO for diversion other than in conformity with the EPA's order.[6] *Cf. Myers v. United States*, 323 F.2d 580, 583 (9th Cir. 1963).

[2] Plaintiffs' damage claim does not "challenge" the CERCLA cleanup plan and is thus unaffected by CERCLA's provision limiting such challenges. 42 U.S.C. § 9613(h). Although determination of whether ARCO's diversions were "wrongful," *Tucker*, 250 P. at 15, may require examination of the EPA's orders,[7] resolution of the damage claim would not involve altering the terms of the cleanup order. If the plaintiffs prevail, the remedy would be financial compensation for lost crops and lost profits. *Id.* at 18. Such a remedy would not interfere with ARCO's implementation of the cleanup.[8] *Cf. McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 331 (9th Cir. 1995); *petition for cert. filed*, 63 U.S.L.W. 3819 (U.S. May 1, 1995) (No. 94-1807).

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[6]If it were impossible to divert water into the ponds without injuring the plaintiffs' water rights, we might agree with the district court that the "inescapable conclusion" was that the EPA had authorized ARCO to take those rights. But because the plaintiffs own the right to use a certain amount of water for a beneficial use, not the corpus of the water itself, *Tucker v. Missoula Light & Water Co.*, 77 Mont. 91, 250 P. 11, 15 (1926), ARCO could comply with the order by buying storage water or senior water rights from others.

We express no opinion on the merits of the plaintiffs' state law claims against ARCO or their potential claims against the United States.

[7]Although ARCO may defend itself by asserting that it acted within the EPA's orders, that is a question of fact, not of jurisdiction. *See Myers*, 323 F.2d at 583; *cf. Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1394-95 (9th Cir. 1988) (plaintiff may avoid federal court by relying exclusively on state law even if defendant asserts a federal defense).

[8]Moreover, a citizen suit under 42 U.S.C. § 9659(a)(1) is not the plaintiffs' sole remedy against ARCO; CERCLA preserves the plaintiffs' right to pursue state law remedies. 42 U.S.C. §§ 9652(d), 9659(h); *see Stanton Road Assoc. v. Lohrey Enter.*, 984 F.2d 1015, 1021-22 (9th Cir. 1993).

[3, 4] Because plaintiffs' damage claim is based entirely on state law, the district court lacks jurisdiction unless it has jurisdiction because of West Side's claim for injunctive relief. Although the district court dismissed this claim, and West Side Ditch does not appeal that dismissal, we consider all of the claims asserted in the complaint to determine whether the district court has jurisdiction. *Harrell v. 20th Century Ins. Co.*, 934 F.2d 203, 205 (9th Cir. 1991). We conclude that the district court does not have jurisdiction over West Side's claim for injunctive relief because that claim constitutes a "challenge" to the CERCLA cleanup effort over which the district court would not have jurisdiction until the cleanup was completed. 42 U.S.C. § 9613(h); *see McClellan*, 47 F.3d at 328-30.

[5] Because plaintiffs' claims are based solely on state law, and inclusion of the Montana Department of Fish, Wildlife, and Parks as a defendant destroys diversity, 28 U.S.C. § 1332, the district court lacks jurisdiction.[9]

VACATED AND REMANDED WITH DIRECTIONS TO REMAND TO STATE COURT.

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[9]Our disposition renders ARCO's cross-appeal moot.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS A. BECK; MELVIN R. BECK;
ROBERT EVANS,

Plaintiffs-Appellants,

No. 94-35487

v.

D.C. No. CV-92-00036-PGH

ATLANTIC RICHFIELD COMPANY, a
Delaware Corporation, and
THE MONTANA DEPARTMENT OF FISH
WILDLIFE AND PARKS,

Defendants-Appellees.

THOMAS A. BECK; MELVIN R. BECK;
ROBERT EVANS,

Plaintiffs-Appellees,

No. 94-35551

v.

D.C. No. CV-92-00036-PGH

ATLANTIC RICHFIELD COMPANY,

Defendant-Appellant.

WEST SIDE DITCH COMPANY, a Montana Corporation; CITY OF DEER LODGE; RONALD KELLY; JERRY RUTLEDGE; CHARLES BECK; RICHARD FORSON; GEORGE REISTAD,

Plaintiffs-Appellants,

No. 94-35539

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

D.C. No. CV-91-00002-PGH

Intervenor-Appellee,

v.

ATLANTIC RICHFIELD COMPANY, a Delaware corporation; MONTANA DEPARTMENT OF FISH WILDLIFE AND PARKS,

Defendants-Appellees.

WEST SIDE DITCH COMPANY, a Montana Corporation; CITY OF DEER LODGE; RONALD KELLY; JERRY RUTLEDGE; CHARLES BECK; RICHARD FORSON; GEORGE REISTAD,

Plaintiffs-Appellees,

No. 94-35552

D.C. No. CV-91-00002-PGH

v.

ATLANTIC RICHFIELD COMPANY, a Delaware corporation;

Defendant-Appellant.

ORDER

October 31, 1995

Before: BROWNING, WRIGHT and T. G. NELSON, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

WEST SIDE DITCH COMPANY, a Montana corporation,

Plaintiff,

vs.

ATLANTIC RICHFIELD COMPANY, a Delaware corporation, and THE MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS,

Defendants.

No. CV-91-002-SU

ORDER

[Filed March 5, 1991]

The plaintiff's motion for remand having been presented to the court, and the court having reviewed the briefs of the parties in support of their respective positions,

IT IS HEREBY ORDERED that plaintiff's motion for remand be, and the same hereby is, DENIED.

DATED this 5th day of March, 1991.

/s/PAUL G. HATFIELD, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BUTTE DIVISION

WEST SIDE DITCH COMPANY, a Montana corporation,

Plaintiff,

vs. No. CV-91-002-BU

ATLANTIC RICHFIELD COMPANY, a Delaware corporation, and THE MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS,

ORDER

[Filed December 10, 1993]

Defendants.

BACKGROUND

On September 3, 1983, the United States Environmental Protection Agency ("EPA") placed the Silver Bow Creek/Butte Area Superfund Site on the National Priorities List. In the ensuing six years, remedial investigations and feasibility studies were undertaken to develop a plan, pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601, *et. seq.* ("CERCLA"), for cleaning up the site. The above-entitled action has its genesis in the resultant cleanup activities undertaken at the Warm Springs Ponds "operable unit"[10] of the Silver Bow Creek/Butte Area Superfund Site.

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[10] The term "operable unit" collectively refers to a number of separate activities undertaken as part of a CERCLA cleanup operation.

On July 3, 1990, the EPA issued an administrative order directing the Atlantic Richfield Company ("Arco") to remove contaminated tailings and soil from the Mill Willow Bypass near Anaconda, Montana.[11] In accordance therewith, Arco routed the waters of Mill and Willow Creeks into the Warm Springs treatment ponds to allow for precipitation of suspended solids from the water.

On September 28, 1990, the EPA issued its Record of Decision, which set forth the interim remedial action[12] to be implemented at the Warm Springs Ponds operable unit. One of the remedial actions selected by the EPA was to allow the Warm Springs ponds to remain operational as treatment ponds until the clean-up of upstream sources of contamination could be accomplished.

On December 3, 1990, Westside Ditch Company ("Westside")[13], instituted an action in the District Court of the Third Judicial District of the State of Montana, asserting its water rights in the flow of the Mill Willow

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11 The Mill Willow Bypass is a man-made channel built to route the flows of Mill Creek and Willow Creek, together with high flows of Silver Bow Creek, around the Warm Springs treatment ponds located near Warm Springs, Montana. The Warm Springs treatment ponds, which have been in operation since approximately 1918, were built to detain the waters of Silver Bow Creek so that suspended solids could precipitate out of the impounded water.

12 Removal actions refer to immediate or interim measures taken to halt the immediate risks posed by hazardous substances. *See*, 42 U.S.C. § 9601(23). Remedial actions refer to permanent remedies to address damages resulting from the release of hazardous substances and to eliminate the threat posed by the site. *See*, 42 U.S.C. § 9601(24). "Response action" is a term denominating both removal and remedial actions. *See*, 42 U.S.C. § 9601(25).

13 The Westside Ditch Company ("Westside") was organized to supply irrigation water to certain farms and ranches near Deer Lodge, Montana. Westside's shareholders depend heavily upon water supplied by Westside for their livelihood. Westside's most important assets are two water rights from the Clark Fork River, which have priority dates of June 28, 1889, and December 7, 1949, and which provide the Westside shareholders with the majority of their water.

Bypass had been adversely affected by Arco's actions. Westside's complaint sought the following relief:

> (1) a declaration that its rights to the waters of the Mill Willow Bypass are paramount to any water rights of defendants;
>
> (2) an injunction prohibiting defendants from diverting the waters of the Mill Willow Bypass or engaging in any activity which interferes with plaintiff's right to waters of the Clark Fork of the Columbia;
>
> (3) an order requiring the release of all waters from the Mill Willow Bypass impounded by the defendants; and
>
> (4) damages arising from crop loss allegedly sustained as a result of said impoundments of Mill Willow Bypass flows.

Arco removed the action, pursuant to 28 U.S.C. § 1441, invoking the federal question jurisdiction of this court, under 28 U.S.C. § 1441(b) and 42 U.S.C. § 9513(b). Westside moved to remand the action to state district court, asserting no basis for federal question jurisdiction was "disclosed upon the face of the complaint." On March 5, 1991, this court denied Westside's motion to remand.

On May 24, 1991, Westside filed a petition for injunctive relief, requesting the court to enjoin all impoundments of waters from Silver Bow, Mill and Willow Creeks and the Mill Willow Bypass in the Warm Springs treatment ponds.[14] Arco has moved the court to dismiss Westside's claim for injunctive relief for lack of subject matter jurisdiction.

On July 9, 1992, Arco moved the court to dismiss plaintiff's equitable and damage claims, asserting an inverse condemnation action under the Tucker Act, 23 U.S.C. § 1491, provides Westside's exclusive

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[14] Westside also moved the court for leave to file an amended complaint to add (1) the individual shareholders of Westside as party plaintiffs; and (2) a claim for punitive damages against Arco. On July 30, 1991, the court granted Westside's motion to amend.

remedy. Westside and the United States[15] have filed briefs in opposition to ARCO's motion. Having reviewed the record herein, together with the parties' briefs in support of their respective positions, the court is prepared to rule.

DISCUSSION

A. Injunctive Relief

CERCLA, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), provides a statutory scheme for cleaning up hazardous substances. The statute allows the EPA to undertake direct removal or remedial actions to protect the public health and welfare or the environment when it determines that release of a hazardous substance poses an imminent and substantial danger. *Schalk v. Reilly*, 900 F.2d 1091, 1092 (7th Cir. 1990), *cert. denied*, 498 U.S. 981 (1990). In addition, CERCLA authorizes the EPA to issue administrative orders directing private parties to take such actions as may be necessary to protect the public health, welfare and environment. 42 U.S.C. § 9606(a).

Section 113(b) of CERCLA grants district courts exclusive original jurisdiction over all controversies arising under CERCLA. *See*, 42 U.S.C. § 9613(b). This jurisdictional grant, however, is limited by section 113(h), which provides:

> Timing of Review: No federal court shall have jurisdiction under federal law . . . to review any challenge to removal or remedial actions selected under section 9604, or to review any order issued under section 9606(a), in any action except one of the following:

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[15] On February 24, 1992, the United States of America moved, pursuant to Fed.R.Civ.P. 24, to intervene in the present action. The court granted the United States' motion, holding, "the government, acting through the Environmental Protection Agency, has a direct interest in this litigation which goes beyond the interests of the existing parties." The United States has joined Arco's motion to dismiss Westside's request for injunctive relief.

(1) An action under section 9607 to recover response costs or damages or for contribution.

(2) An action to enforce an order issued under section 9606(a) or to recover a penalty for violation of such order.

(3) An action for reimbursement under section 9606(b)(2).

(4) An action under section 9659 (relating to citizen suits) alleging that the removal or remedial action taken under section 9604 or secured under section 9606 was in violation of any requirement under this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

(5) An action under section 9606 in which the United States has moved to compel a remedial action.

42 U.S.C. § 9613(h)

Congress expressly limited federal court jurisdiction over challenges to EPA activities under CERCLA in order to prevent delay of cleanup by litigation, including litigation concerning the EPA's compliance with laws other than CERCLA. *Boarhead Corp. v. Erickson*, 726 F.Supp. 607, 610 (E.D.Pa. 1989), *affirmed*, 923 F.2d 1011 (3rd Cir. 1991). *See also*, *Chemical Waste Management Inc. v. United States Environmental Protection Agency*, 673 F.Supp. 1043, 1055 (D. Kan. 1987) ("the legislative history of section 113(h) establishes that it was designed to preclude piecemeal review and excessive delay of cleanup"). CERCLA's "primary purpose is the prompt cleanup of hazardous waste sites . . . ." *J. V. Peters & Co., Inc. v. Administrator*, 767 F.2d 263, 264 (6th Cir. 1985), and, judicial review of the procedure employed in selecting a remedy necessarily impacts the implementation of the remedy, thereby resulting in the same delays Congress sought to avoid by passage of the statute. *See*, *Schalk*, *supra*, 900 F.2d at 1097.

As a result, complaints which seek court-ordered modification of the remedial decisions embodied in a Record of Decision are barred until the remedial action is completed, unless one of the enumerated exceptions apply. *Fairchild Semiconductor Corp. v. U.S. E.P.A.*, 759 F.Supp. 1553,

1559 (N.D. Cal. 1991) (citations omitted). "The obvious meaning of this statute [section 113(h)(4)] is that when a remedy has been selected, no challenge to the cleanup may occur prior to completion of the remedy." *Schalk*, 900 F.2d at 1095.

> The plain language of the statute indicates that section 113(h)(4) applies only after a remedial action is actually completed. The section refers in the past tense to remedial actions taken under section 104 or secured under 106. Absent clear legislative intent to the contrary, this language is conclusive.

Id., *quoting*, *State of Alabama v. EPA*, 871 F.2d 1548, 1557 (11th Cir. 1989) (emphasis in original).

Given the clear legislative history of section 9613 and the unambiguous interpretation which the federal appellate courts have given that particular statute, this court is compelled to conclude section 9613 precludes any challenge which would delay cleanup activity to which the EPA has given final approval. Westside's claims for injunctive relief do not fall within any of the five exceptions to the jurisdictional limitations set forth in 9613(h). Furthermore, CERCLA does not establish a private right of action for injunctive relief. *See*, *Cadillac Fairview/California v. Dow Chemical Co.*, 840 F.2d 691 (9th Cir. 1988); *State of Colorado v. Idarado Mining Co.*, 916 F.2d 1486 (10th Cir. 1990).

Accordingly, the court concludes Arco's motion to dismiss be, and the same hereby is, GRANTED with respect to Westside's claim for injunctive relief.

B. Monetary Damages

Arco moves the court to dismiss Westside's claims for monetary damages, asserting the sole remedy, under the circumstances presented, lies with an action for inverse condemnation under the Tucker Act, 28 U.S.C. § 1491. The court agrees.

The Tucker Act, 23 U.S.C. § 1491, operates as a waiver of the immunity enjoyed by the United States as sovereign. The Tucker Act grants exclusive jurisdiction to the United States Claims Court "against the United States founded either upon the Constitution, or any Act of

Congress, or any regulation of an executive department, or upon any express or implied contract with the United States . . . ." Because the Tucker Act operates as a waiver of sovereign immunity by the United States, it must be strictly construed by the courts. *See, e.g., Library of Congress v. Shaw*, 478 U.S. 310 (1986). Consistent with the jurisdictional limitations imposed by 28 U.S.C. § 1346(a), any claim against the United States for monetary relief in excess of $10,000 is exclusively within the jurisdiction of the Claims Court. *See, United States v. Hohri*, 482 U.S. 64, 72 (1987).

In the case *sub judice*, Westside maintains Arco, in routing Mill, Willow and Silver Bow Creeks through the Warm Springs treatment ponds, has adversely affected their water rights. It is beyond dispute that Arco's actions were CERCLA response actions elected and ordered by the EPA.[16] Furthermore, the adverse impact on Westside's water rights will undoubtedly continue for as long as the CERCLA response actions remain in effect. Therefore, the inescapable conclusion is that Westside's water rights have been subordinated by the EPA for use in implementing the CERCLA response actions at the Warm Springs operable unit of the Silver Bow Creek/Butte Area Superfund Site.

In *United States v. Fisher*, 864 F.2d 434, 438-39 (7th Cir. 1988), a property owner alleged a taking of his property had occurred as a result of EPA activities thereon. The Seventh Circuit Court of Appeals stated:

> Should [a taking occur], Fisher would have a monetary remedy in the United States Claims Court under the Tucker Act, 28 U.S.C. § 1491; *see, Hendler v. United States*, *supra*, – and that remedy would be exclusive. (citations omitted.)

Likewise, the legislative history to CERCLA § 104(j), 42 U.S.C. § 9604(j), provides:

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[16] The EPA is vested with the sole authority to determine the character, timing and methods of response actions. 42 U.S.C. § § 9604(c)(4); 9621(a). As a result, a private party conducting response actions pursuant to an administrative order of the EPA remains subject to the authority and oversight of the EPA. 42 U.S.C. § 9604(a).

> [E]ven if [EPA's Section 104(j)] authority is not exercised, persons who believe that their property has been taken by response action may seek compensation under the Tucker Act, 28 U.S.C. § 1491.

H. Rep. No. 962, 99th Cong., 2d Sess. 197 (1986).

Westside and the United States assert Arco's cleanup activities are not attributable to the United States because Arco is neither an agent or a contractor of the federal government. The court disagrees. Arco's activities within the scope of the EPA's administrative orders are attributable to the federal government for purposes of takings law to the same extent as the activities of the EPA itself. *Hendler v. United States*, 952 F.2d 1364, 1379 (Fed. Cir. 1991).

> As the Court in *Loretto* observed, "[a] permanent physical occupation authorized by [a government] is a taking without regard to whether the [government], or instead a party authorized by the [government], is the occupant."

Id., *quoting*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 n.9 (1982).

To the extent Westside alleges Arco has acted in contravention of the EPA's administrative orders, the sole remedy provided by CERCLA lies in an action, pursuant to 42 U.S.C. § 9659, to enforce the administrative order. Such a remedy, however, is subject to the limitations of § 113(h), 42 U.S.C. § 9613(h), which precludes any citizen suit prior to the completion of the remedial action. *See*, *Alabama v. U.S. EPA*, 871 F.2d 1548, 1557 (11th Cir. 1989).

Therefore, the court concludes Westside's exclusive remedy for the alleged taking of its water rights by Arco lies in an action against the United States for inverse condemnation in the United States Claims Court under the Tucker Act, 28 U.S.C. § 1491.[17] Accordingly, the court con-

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[17] The court notes that in the event Westside establishes a taking of its water rights and recovers just compensation from the United States, the United States could seek recovery of such amounts from

(continued...)

cludes Arco's motion to dismiss be, and the same hereby is, GRANTED as to plaintiff's claims for monetary damages.

CONCLUSION

For the reasons set forth herein, the court concludes plaintiff's complaint be, and the same hereby is, dismissed without prejudice. The court shall consider the propriety of transferring the present action to the Court of Claims, pursuant to 28 U.S.C. § 1631, if the plaintiff requests such relief within ten (10) days of the date hereof.

IT IS SO ORDERED.

DATED this 10 day of December, 1993.

/s/PAUL G. HATFIELD, CHIEF JUDGE
UNITED STATES DISTRICT COURT

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[17](...continued)
Arco as a "response cost" under CERCLA § 107(a), 42 U.S.C. § 9607(a).

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BUTTE DIVISION

THOMAS A. BECK, MELVIN R. BECK and ROBERT EVANS,

Plaintiffs,

NO. CV-92-036-BU

vs.

ATLANTIC RICHFIELD COMPANY, a Delaware corporation, and THE MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS,

ORDER

[Filed December 15, 1993]

Defendants.

For the reasons set forth in the court's order entered in *West Side Ditch Company v. Atlantic Richfield Company, et al.*, No. CV-91-002-BU (D. Mont.), on December 10, 1993, the above-entitled action is hereby DISMISSED without prejudice. The court will consider the propriety of transferring the present action to the Court of Claims, pursuant to 28 U.S.C. § 1631, if the plaintiff requests such relief within ten (10) days of the date hereof.

DATED this 15 day of December, 1993.

/s/PAUL G. HATFIELD, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BUTTE DIVISION

WEST SIDE DITCH COMPANY, a Montana corporation,

Plaintiff,

vs.

NO. CV-91-002-BU

ATLANTIC RICHFIELD COMPANY, a Delaware corporation, and THE MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS,

Defendants.

ORDER

[Filed April 15, 1994]

Having reviewed the record herein, together with the parties' briefs in support of their respective positions, the court concludes the "Motion to Partially Vacate Judgment" filed on behalf of plaintiff Westside Ditch Company be, and the same hereby is, DENIED.

IT IS FURTHER ORDERED that defendant Atlantic Richfield Company's motion to alter or amend the January 11, 1994, Judgment in the above-entitled matter be, and the same hereby is, DENIED.

IT IS SO ORDERED.

DATED this 15 day of April, 1994.

/s/PAUL G. HATFIELD, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX G

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BUTTE DIVISION

THOMAS A. BECK, MELVIN R. BECK and ROBERT EVANS,

Plaintiffs,

No. CV-92-036-BU

vs.

ATLANTIC RICHFIELD COMPANY, a Delaware corporation, and THE MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS,

ORDER

[Filed April 15, 1994]

Defendants.

Having reviewed the record herein, together with the parties' briefs in support of their respective positions, the court concludes plaintiffs Thomas A. Beck, Melvin R. Beck and Robert Evans' motion requesting the court to reconsider the December 15, 1993, order dismissing plaintiffs' complaint be, and the same hereby is, DENIED.

IT IS FURTHER ORDERED that defendant Atlantic Richfield Company's motion to alter or amend the December 15, 1993, Judgment in the above-entitled matter be, and the same hereby is, DENIED.

IT IS SO ORDERED.

DATED this 15 day of April, 1994.

/s/PAUL G. HATFIELD, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX H

28 U.S.C.A. § 1441 (1993)

(b) Any civil action of which the district courts have original jurisidiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

42 U.S.C.A. § 9604 (1995) Response authorities

(a) Removal and other remedial action by President; applicability of national contingency plan; response by potentially responsible parties; public health threats; limitations on response; exception

(1) Whenever (A) any hazardous substance is released or there is substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment. When the President determines that such action will be done properly and promptly by the owner or operator of the facility or vessel or by any other responsible party, the President may allow such person to carry out the action, conduct the remedial investigation, or conduct the feasibility study in accordance with section 9622 of this title. No remedial investigation or feasibility study (RI/FS) shall be authorized except on a determination by the President that the party is qualified to conduct the RI/FS and only if the President contracts with or arranges for a qualified person to assist the President in overseeing and reviewing the conduct of such RI/FS and if the responsible party agrees to reimburse the Fund for any cost incurred by the President under, or in connection with, the oversight contract or arrangement. In no event shall a potentially responsible party be subject to a lesser standard of liability, receive preferential treatment, or in any other way, whether direct or indirect, benefit from any such arrangements as a response action contractor, or as a person hired or retained by such a response action contractor, with respect to the release or facility in question. The President shall give primary attention to those releases which the President deems may present a public health threat.

42 U.S.C.A. § 9606 (1995) Abatement actions

(a) Maintenance, jurisdiction, etc.

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare of the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

42 U.S.C.A. § 9613 (1995) Civil proceedings

(b) Jurisdiction; venue

Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

(h) Timing of review

No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under 9606(a) of this title, in any action except one of the following:

(1) An action under section 9607 of this title to recover response costs or damages or for contribution.

(2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.

(3) An action for reimbursement under section 9606(b)(2) of this title.

(4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

(5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

42 U.S.C.A. § 9652 (1995) Effective dates; savings provisions

(d) Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants. The provisions of this chapter shall not be considered, interpreted, or construed in any way as reflecting a determination, in part or whole, of policy regarding the inapplicability of strict liability, or strict liability doctrines, to activities relating to hazardous substances, pollutants, or contaminants or other such activities.

42 U.S.C.A. § 9659 (1995) Citizens suits

(a) Authority to bring civil actions

Except as provided in subsections (d) and (e) of this section and in section 9613(h) of this title (relating to timing of judicial review), any person may commence a civil action on his own behalf –

(1) against any person (including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter (including any provision of an agreement under section 9620 of this title, relating to Federal facilities); ....

(h) Other rights

This chapter does not affect or otherwise impair the rights of any person under Federal, State, or common law, except with respect to the timing of review as provided in section 9613(h) of this title or as otherwise provided in section 9658 of this title (relating to actions under State law).

No. 95-1387

(2)

Supreme Court, U.S.
FILED
MAR 29 1996

In The

Supreme Court of the United States

October Term, 1995

ATLANTIC RICHFIELD COMPANY, a Delaware Corporation,

Petitioner,

vs.

WEST SIDE DITCH COMPANY, a Montana Corporation; CITY OF DEER LODGE; RONALD KELLY; JERRY RUTLEDGE; CHARLES BECK; RICHARD FORSON; GEORGE REISTAD; THE MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; THOMAS A. BECK; MELVIN R. BECK; ROBERT EVANS,

Respondents.

On Petition for Wit of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review the doctrine of complete federal pre-emption, when the issue of pre-emption was not raised by the Petitioner on appeal, and was not discussed by the appellate court in its opinion.

2. Whether the Respondents' state law-based claims for monetary damages constitute a "challenge," or an effort to "review" an EPA order within the meaning of CERCLA § 9613(h), when the EPA has concluded that Respondents' claims are not a "challenge" or an effort to "review" its cleanup orders.

PARTIES TO THE PROCEEDINGS

The list of parties described in Petitioner's brief is correct.

As required by Supreme Court Rule 29.6, Respondent West Side Ditch Company states that it does not have a parent company, or any subsidiaries or affiliates.

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STATEMENT OF THE CASE

The doctrine of complete pre-emption was not raised by the Petitioner during the appeals process in the Ninth Circuit, and was not discussed in the Ninth Circuit's opinion. Petitioner's assertion that this case presents a "significant and recurring issue under the doctrine of complete pre-emption" is incorrect.

The Ninth Circuit ruled that under 42 U.S.C. § 9613(h), Respondents' state law-based water law and tort claims are not a "challenge" to a "removal or remedial action" or an attempt "to review any order" issued by the United States Environmental Protection Agency (EPA). Petitioners ask that the Ninth Circuit's ruling be overturned.

A. Factual Background

West Side Ditch Company is a Montana Corporation organized to provide irrigation water to ranchers along the Clark Fork River. The individual plaintiffs in these two actions are shareholders of the corporation or persons entitled to receive water from the Clark Fork River.[1]

ARCO operates a series of tailings ponds (Warm Springs Ponds) located above Respondents' diversions on the Clark Fork River. In 1985 ARCO sold its historic water rights in the Warm Springs Ponds, thereby depriving itself of any further right to the use of water out of the Clark Fork River. After selling its rights, ARCO continued diverting water from the Clark Fork River and its tributaries illegally, which diminished flows in the Clark Fork River at the Respondents' headgates, and caused damage to their crops.

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1. The plaintiffs will be referred to collectively as West Side water users.

After several unsuccessful requests that ARCO cease its illegal diversions, West Side filed suit in December of 1990 in state district court. The West Side water users alleged that ARCO had interfered with their water rights resulting in crop losses and economic damages. Respondents' Appendix B, pp. 14a, 15a, 17a; Appendix D, pp. 31a, 32a, 33a.

West Side's request for monetary damages is based on statutory and common law principles which form the prior appropriation doctrine. Among these principles is a requirement that:

> a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department.

Mont. Code Ann. § 85-2-302.

The term "appropriate" means to divert, impound or withdraw (including by stock for stockwater) a quantity of water. Mont. Code Ann. § 85-2-102. Water may only be "appropriated" for a "beneficial use." Mont. Code Ann. § 85-2-301. A "beneficial use" is defined as:

> a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stockwater), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses.

Mont. Code Ann. § 85-2-102(2)(a).

Of primary importance to West Side is the rule that senior water rights have priority over junior water rights, and that junior water users who divert water out of priority are liable for the damages caused by their diversion. *Atchison v. Peterson*, 87 U.S. 507 (1874); *Quigley v. Birdseye*, 11 Mont. 439, 28 P. 741 (1892).

After removal to federal court, ARCO moved to dismiss West Side's claims, asserting that it was acting pursuant to orders issued by the EPA and that 42 U.S.C. § 9613(h) required dismissal of any claim which was a challenge to cleanup efforts in the basin. ARCO further argued that West Side's complaint actually stated a claim for inverse condemnation against the United States because ARCO's diversion of water was made pursuant to orders issued by the EPA.

The EPA had little sympathy for ARCO's assertion that it was entitled to harm downstream water users under the auspices of CERCLA. In orders issued *after* West Side's action was filed, the EPA required ARCO to follow Montana water law as part of its cleanup efforts, and recognized the right of an injured water user to proceed against ARCO for damages under state tort law. This intent is driven home by the Administrative Order for Remedial Design/Remedial Action issued on June 17, 1993:

> Nothing in this Unilateral Administrative Order shall alter any obligation Respondent may have under state law to provide compensation or payment for the use of water.

Appendix Ex. G; CR 148, Exhibit C, Administrative Order for Remedial Design/Remedial Action, page 26.

An October 16, 1991 letter from the EPA Superfund Branch Chief stated that:

> to protect water rights as stated in Montana's codes and administrative rules . . . ARCO is required to assure that water rights are not adversely affected by its action.

Appendix Ex. K; CR 148, Exhibit F.

ARCO failed to obtain water rights necessary for diversion and usage of water in the Clark Fork Basin, and continued to make out-of-priority diversions of water which depleted the supply of water available to West Side water users. *See generally* Appendix Ex. L; CR 162.

The EPA has never authorized out-of-priority diversions by ARCO. Nevertheless, ARCO has diverted water repeatedly, even though it owns no water rights senior to those held by West Side water users. The West Side water users have been significantly damaged by these out-of-priority diversions.

B. Proceedings Below

1. *Federal District Court Proceedings*

In December 1993, the United States District Court dismissed the injunctive relief portion of the West Side Ditch Company complaint on the grounds that 42 U.S.C. § 9613 precluded any challenges to an EPA cleanup activity. Petitioner's Appendix D, p. 16a. The district court also dismissed West Side's claims for monetary damages on the grounds that the complaint alleged a taking of water rights and that such an action would only lie against the United States under the Tucker Act, 28 U.S.C. § 1491. Petitioner's Appendix D, p. 17a.

West Side Ditch Company *et al.*, and Beck *et al.* appealed the dismissal of their monetary damages claims to the Ninth Circuit

court of appeals. West Side Ditch Company did not appeal the dismissal of its request for injunctive relief.

2. *Ninth Circuit Proceedings*

The Ninth Circuit Court of Appeals reversed the district court's decision to dismiss the plaintiffs' compensatory and punitive damages claims. Respondents' Appendix A, pp. 8a, 9a. The court found that the plaintiffs had "expressly allege[d] a cause of action based purely on state law." Respondents' Appendix A, p. 7a. Based on this finding, the court concluded that the plaintiffs had not stated a claim for inverse condemnation against the United States. Respondents' Appendix A, pp. 8a, 9a.

The appellate court also ruled that "Plaintiffs' damage claim does not 'challenge' the CERCLA cleanup plan and is thus unaffected by CERCLA's provision limiting such challenges." Respondents' Appendix A, p. 8a. The appellate court observed that if the plaintiffs prevail on their state law compensatory damages claims, "the remedy would be financial compensation for lost crops and lost profits. Such a remedy would not interfere with ARCO's implementation of the cleanup." *Id.* at 8a, 9a.

The Petitioner asserts that the appeals court "overlooked the text of Section 9613(h) ... and did not consider the consequences [that its decision] might have for the analysis of federal subject matter jurisdiction." Petitioners' Brief at 12. Contrary to Petitioner's assertion, the appellate court cited § 9613(h) directly as support for its conclusion that "Plaintiffs' damage claim does not 'challenge' the CERCLA cleanup plan." *Id.*

Next, the Petitioner contends that the appellate court did not recognize that § 9613(h) "withdraws jurisdiction to review any

challenges to removal or remedial action." Petitioner's Brief at 12. Again, this statement mischaracterizes the appellate court's action. The court expressly found that the Respondents' claims were not a "challenge" within the meaning of 42 U.S.C. § 9613(h), thereby obviating the need for a discussion of jurisdiction.

Respondents do not contest the Ninth Circuit's order dismissing its request for injunctive relief.

REASONS FOR DENYING THE WRIT

The issue of federal pre-emption was not raised by the Petitioner on appeal in the Ninth Circuit, and no discussion of pre-emption occurred in the appellate court's decision. Even assuming that other circuit courts have applied the doctrine of pre-emption erratically, a meaningful analysis of pre-emption cannot occur in this case.

Petitioner also argues that this case raises an issue regarding what claims constitute challenges to response actions under § 9613(h). Such an inquiry is necessarily factual. "[A] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rules of the Supreme Court, Rule 10(c). If this Court decides to make a factual inquiry, it should be aware of the EPA's repeated pronouncements that the Respondents' complaint is not a "challenge" to EPA cleanup efforts, and the Ninth Circuit court's finding that no "challenge" exists because "ARCO could comply with the [EPA's] order by buying storage water or senior water rights from others." Respondents' Appendix A, p. 8a, n. 6.

The EPA does not share Petitioner's belief that "the Ninth Circuit's decision has enormous consequences for the effective

administration and enforcement of CERCLA." Petitioner's Brief at 14. The EPA has supported the Respondents' right to bring claims for monetary damages against the Petitioner at each step of this litigation. If the Respondents' claims for monetary damages were likely to have the "enormous consequences" suggested by the Petitioner, then the EPA would have opposed those claims from the outset. The EPA's support of the Respondents' state law claims sharply contradicts the Petitioner's assertion that this case has nationwide implications for the Superfund program.

I.

PRE-EMPTION

1. The Petitioner argues that this Court should grant certiorari in a case which does not discuss pre-emption, in order to resolve conflicts relating to pre-emption allegedly existing in other courts of appeal. None of the cases cited by the Petitioner discuss application of the complete pre-emption doctrine to CERCLA.

Petitioner's bid for certiorari is based on a footnote in the Ninth Circuit's opinion which states that "plaintiff may avoid federal court by relying exclusively on state law even if defendant asserts a federal defense." Respondents' Appendix A, p. 8a, n.7. The Petitioner contends that this brief reference to the well pleaded complaint rule justifies a comprehensive review of the pre-emption doctrine.

Federal courts acquire jurisdiction under Article III of the Constitution, and under 28 U.S.C. § 1331, which provides "that the district court shall have . . . jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States." Civil actions which are brought in state court, but which

"arise under" federal law, "may be removed by the defendant . . . to the district court of the United States." 28 U.S.C. § 1441. Thus, "only state court actions that originally could have been filed in federal court may be removed to federal court." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987).

The test used to differentiate between state court actions that involve federal questions, and those that do not, is the well pleaded complaint rule. The well pleaded complaint rule "makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar*, 482 U.S. at 392. "As a practical matter," the well pleaded complaint rule "severely limits the number of cases in which state law 'creates the cause of action' that may be initiated in or removed to federal district court, thereby avoiding more or less automatically a number of potentially serious federal/state conflicts." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8, 88 L. Ed. 2d 420, 103 S. Ct. 2841 (1983)

The existence of federal issues in a state law-based case does not indicate that federal courts have jurisdiction over a dispute. "It is now settled law that a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiffs' complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar Inc. v. Williams*, 482 U.S. at 393 (emphasis supplied in the original).

An infrequently employed corollary of the well pleaded complaint rule is the doctrine of complete pre-emption, which holds that federal courts have jurisdiction in circumstances where the pre-emptive force of a federal statute "is so powerful as to displace entirely any state cause of action." *Franchise Tax Board* at 23. Such pre-emption occurs when Congress has "so

completely pre-empt[ed] a particular area, that any civil complaint raising this select group of claims is necessarily federal in character." *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 63, 64 (1987).

This Court has applied the complete pre-emption doctrine with caution. "We have consistently emphasized that, in exploring the outer reaches of section 1331, determinations about federal jurisdiction require sensitive judgments about Congressional intent, judicial power, and the federal system." *Merrell Dow Pharmaceuticals, Inc. v. Thompson,* 478 U.S. 804, 811, 92 L. Ed. 2d 650, 106 S. Ct. 3229 (1986). Such decisions are necessarily "close . . . in the absence of explicit direction from Congress." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. at 63. "Pre-emption should not be lightly inferred." *Lingle v. Norge,* 486 U.S. 399, 413 (1988), citing *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1, 21 (1987).

2. Although the doctrine of complete pre-emption was not discussed in the Ninth Circuit, Petitioner contends that this case merits issuance of a writ of certiorari to discuss application of the complete pre-emption doctrine. The cases cited by Petitioner to support this contention do not discuss CERCLA.

The Petitioner compares *Rice v. Panchal,* 65 F.3d 637 (7th Cir. 1995), a case involving ERISA, with the decisions of other circuit courts involving ERISA, as evidence that the doctrine of pre-emption is being applied unevenly. Like other circuits, the court in *Rice v. Panchal* noted that "the foundation for removal is the creation of federal law to replace state law." 65 F.3d at 641, citing *Bartholet v. Reishauer A. G. (Zurich),* 953 F.2d 1073, 1075 (7th Cir. 1992). Petitioner contends that *Rice v. Panchal* is unique because it holds that complete federal pre-emption of state law can occur even though federal substantive law does not precisely mirror the state law it replaces. This concept is hardly

novel, given that the same rationale was used in *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58 (1987), where this Court held that plaintiffs' common-law contract and tort claims were pre-empted by § 502 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, even though § 502 did not supply the plaintiffs with an identical cause of action.

Aaron v. National Union Fire Ins. Co. of Pittsburgh, 876 F.2d 1157 (5th Cir. 1989), also contradicts Petitioners' theory that the circuits are in disarray. In *Aaron,* the court found that complete federal pre-emption did not exist because plaintiffs could not have pleaded a cause of action under the Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 900 *et seq.* that would have replaced otherwise available state causes of action. Nowhere in *Aaron* is there any statement that complete federal pre-emption depends on the existence of a federal cause of action identical to the state cause of action it is replacing.

The standard used in *Aaron* was whether Congress intended to "completely pre-empt a field of state law." *Aaron* at 1161.

The *Aaron* court was careful to distinguish between ordinary pre-emption, which occurs when federal law simply bars a state claim without supplying an alternate remedy, and complete federal pre-emption, which occurs when federal law completely bars the state claim and supplies an alternate, although not necessarily identical, federal remedy. *Aaron* at 1165.

The difference between ordinary and complete pre-emption was also emphasized in *Warner v. Ford Motor Company,* 46 F.3d 531 (6th Cir. 1995), another case under ERISA. The *Warner* court noted that " ordinary pre-emption" and the complete pre-emption giving rise to removal jurisdiction are two distinct concepts. "The fact that . . . a plaintiff's claims are pre-empted

does not establish that they are removable to federal court." *Id.* at 535 citing *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398, 96 L. Ed. 2d 318, 107 S. Ct. 2425, 2432 (1987).

3. Petitioner argues that the Ninth Circuit could have held that § 9659(a)(1) of CERCLA "provides a federal cause of action vindicating the very interests that [the Respondents'] state law claims seek to protect." Petitioner's Brief at 15. The Ninth Circuit could not have reached this conclusion because the Respondents', as masters of their complaint, did not ask for relief under § 9659(a)(1).

The Petitioner attempts to characterize this lawsuit as a § 9659(a)(1) action by inserting new facts and legal theories into the complaint. This approach got short shrift in *Caterpillar* when the defendant "impermissibly attempt[ed] to create the prerequisites to removal by ignoring the set of facts ... presented by respondents, along with their legal characterization of those facts, and arguing that there are different facts which Respondents might have alleged that would have constituted a federal claim." 482 U.S. at 397.

The Petitioner's "attempt to justify removal on the basis of facts not alleged in the Complaint" should be rejected now, as it was in *Caterpillar, id.*

The Court's approach in *Caterpillar* is not new, for it has long been established that the well pleaded complaint rule "makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar* at 392, citing *See the Fair v. Kohler Dye & Speciality Company*, 228 U.S. 22, 25, 57 L. Ed. 716, 33 S. Ct. 410 (1913).

The savings clause contained in 42 U.S.C. § 9659(h) protects the Respondents' right to assert a state law cause of

action. Respondents' decision not to base their complaint on federal law does not create federal pre-emption.[2]

The Petitioner also argues that Congress intended to pre-empt state law by enacting § 9659(h), which provides that "this chapter does not affect or otherwise impair the rights of any person under federal, state, or common law, except with respect to the timing of review as provided in § 9613(h) of this title. . . ." The plain meaning of § 9659(h) is that Congress did not wish to disturb the wide array of federal, state, and common law claims which exist outside of CERCLA.

The only limitation contained in § 9659(h) is a reference to the timing of review provisions contained in § 9613(h). ARCO contends that these timing of review provisions replace state statutory and common law causes of actions with a federal cause of action, thereby causing complete pre-emption. In making this contention, Petitioner confuses the timing of review provisions of § 9613(h) with the doctrine of complete pre-emption.

Complete federal pre-emption occurs when Congress seeks to dominate a particular area of law. *See Caterpillar,* 482 U.S. at 386. Ordinary pre-emption occurs when federal law simply bars a state claim without replacing it with an alternate federal remedy. "A state court action does not 'arise under' an act of Congress . . . even though expressly 'prohibited thereby.' " *Gully v. First National Bank,* 299 U.S. 109, 116, 81 L. Ed. 2d 70, 57 S. Ct. 96 (1936). Although state law claims which "challenge" a CERCLA cleanup are barred by the timing of review provisions of § 9613(h), this is not the same as asserting that Congress

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2. Although Petitioners contend that § 9659(a)(1) would satisfy the complete pre- emption test adopted by the Third, Fifth, and Sixth Circuits, it does not supply any evidence which indicates that Congress, by adopting § 9659(a)(1) intended to completely pre-empt state tort law.

enacted § 9613(h) to dominate the field of state tort law, thereby giving rise to complete federal pre-emption and subjecting such claims to federal removal jurisdiction.

The Petitioner erroneously contends that § 9659(h) would have satisfied the pre-emption standard articulated in *Rice v. Panchal* and *Deford v. Soo Line.* In *Rice v. Panchal,* the court emphasized that "the foundation for removal is the creation of federal law to replace state law." *Rice* at 641 citing *Bartholet* at 1075. The *Rice* court asked whether Congress wanted "federal courts to create a federal common law." *Id.* Because § 9613(h) does not create a new federal cause of action, it does not fall within the scope of the complete pre-emption analysis used in *Rice v. Panchal.*

Similarly, Petitioner contends that the Court in *Deford v. Soo Line R. Co.,* 867 F.2d 1080 (8th Cir. 1989), would have found that pre-emption existed in § 9659(h). Petitioner's Brief at 16. The *Deford* court held that complete federal pre-emption occurs only when Congress "so pervasively occup[ies] the field . . that a competing state law claim necessarily invokes federal law." *Id.* 1084, 1085. The issue in *Deford* was complete pre-emption of state law claims by the Railway Labor Act (RLA). According to the *Deford* court, the "statutory grievance procedures under the RLA are the mandatory and exclusive federal remedy for resolving minor disputes. Congress considered it essential to keep these so-called minor disputes within the National Railroad Adjustment Board and *out of the courts.*" *Id.* at 1085, citing *Union Pacific R. v. Sheehan,* 439 U.S. 89, 94 L. Ed. 2d 354, 99 S. Ct. 399, 402-58 (1978) (emphasis supplied in original). The striking evidence of congressional intent to pre-empt state law expressed in the RLA is not present in § 9613(h).

4. Petitioner also argues that certiorari should issue because of an alleged disagreement between the Third and

Eighth Circuits about Congressional intent regarding the Railway Labor Act. Petitioner implies that the Third Circuit court in *Railway Labor Executives Ass'n v. Pittsburgh & Lake Erie R. Co.*, 858 F.2d 936 (3d Cir. 1988) used a different standard of analysis than the Eighth Circuit court in *Deford v. Soo Line R. Co.*, 867 F.2d 1086 (8th Cir.), *cert. denied*, 492 U.S. 927 (1989). The Petitioner argues that the Third Circuit's test required "affirmative evidence in the [federal statute] or its legislative history that Congress intended state claims of this kind to be removable," Petitioner's Brief at 17 citing *Railway Labor*, 858 F.2d at 942, whereas, the Eighth Circuit somehow expanded this test by inquiring about "the history and purpose of the statute" and by comparing the RLA to "analogous statutes with complete pre-emptive powers." Petitioner's Brief at 17, citing *Deford*, 867 F.2d at 1086. In making this distinction, the Petitioner overlooks *Railway Labor's* careful comparison of the RLA with § 502(a) of ERISA. Although the *Railway Labor* and *Deford* courts ultimately reached different conclusions on the same issue, they used the same methods of analysis.

Granting certiorari in the instant case will not help resolve an alleged problem of congressional intent regarding the Railway Labor Act.

Petitioner contends, that by enacting § 9659(h), Congress intended for state law claims to be removable to federal court. Analysis of the Petitioner's argument necessarily begins with a review of the statute itself. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 96 L. Ed. 2d 318, 107 S. Ct. 2425 (1987). Section 9659(h) reads:

> This chapter does not affect or otherwise impair the rights of any person under federal, state, or common law, except with respect to the timing of review as provided in 9613(h) . . .

The question to be answered is whether the pre-emptive force of § 9659(h) "is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim' . . . ." *Caterpillar,* 482 U.S. at 493.

Section 9659(h) is a savings clause which consists of two parts. The plain language of the first part expressly preserves the right of "any person" to pursue a "Federal, State, or common law" cause of action.

The second portion of § 9659(h) references the timing of review provisions contained in § 9613(h). The timing of review constraints contained in § 9613(h) also fall into two categories. The first includes "challenges to removal or remedial action[s]"; while the second addresses actions brought "to review any order issued under § 9606(a) of" CERCLA.

Petitioner contends that the "federal, state, or common law" causes of action which Congress sought to protect under § 9659(h) are completely pre-empted by the language of § 9613(h), thereby making all federal, state, or common law claims removable to federal court.

The plain language of § 9613(h) suggests a different result. By its terms, § 9613(h) seeks only to preclude state law based claims which "challenge" removal or remedial actions, or "review" orders issued by the EPA under § 9606(a). State law-based claims which do not fit either category remain unaffected.

Congressional intent to pre-empt may be gleaned from legislative history if a statute is ambiguous. Although § 9613(h) is clear, Petitioner engages in an extensive discussion of legislative history in an effort to demonstrate pre-emptive intent. Contrary to Petitioner's assertion that § 9613(h) blocks all claims, Congress enacted § 9613(h) to:

> ensure that Government and private cleanup resources will be directed toward mitigation, not litigation. The section is designed to preclude piecemeal review and excessive delay of cleanup.

Comments of Senator Thurmond, Cong. Rec. S28441 (daily ed. Oct. 3, 1986).

Congress wanted to protect EPA from litigation brought to review EPA's cleanup proposals, or to challenge the EPA's remedy selection. Actions which do not distract EPA from its cleanup objectives are outside the scope of § 9613(h).

Representative Glickman's comments about the first paragraph of § 9613(h) are also noteworthy. "The [r]eference [to 28 U.S.C. 1332] was made to ensure that actions in State court under State law can continue to be brought in Federal court if diversity jurisdiction exists." Cong. Rec. H29735 (Oct. 8, 1986) (Rep. Glickman). These comments show an express intent to allow state law causes of action to be brought in federal court if diversity jurisdiction exists. By implication, Congress also intended that state law causes of action could be filed in state court if diversity jurisdiction *does not* exist, or if the plaintiff selected a state court forum.

Finally, the Congressional Record contains an explicit statement that the Superfund statute was not intended to pre-empt other law. "The Comprehensive Environmental Response Compensation and Liability Act [CERCLA] does not provide for pre-emption of any legally applicable requirement established under any other Federal or State law." Cong. Rec. S14915 (Oct. 3, 1986). This comment is consistent with the EPA's pronouncements concerning the remedy available to the Respondents in the instant case.

> Plaintiffs' claims for relief seek a declaration of water rights, consequential damages, and punitive damages. To the extent that these claims do not challenge or seek to block the response action at the Warm Springs ponds operable unit, they do not appear to implicate CERCLA. [I]f in fact, Plaintiffs' water rights have been impaired, CERCLA does not bar a remedy *unless* that remedy would involve review of the propriety of or possible injunction against, the performance of an ongoing CERCLA response action.

CR 101 at 17 and 18 (emphasis added). Respondents' damages claims do not go to the propriety of, nor do they seek injunction against, any response action.

Petitioner supplies a number of citations to the Congressional Record which it contends demonstrate intent to completely pre-empt state water and tort laws.[3] Careful review

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3. There is a long history of federal deference to state water law. The Mining Act of 1866, 14 Stat. 251 (1866), 43 U.S.C. § 661 (1870), states that "[W]henever, by priority of possession, rights to the use of water for mining, agriculture, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of the court, the possessors and owners of such vested rights shall be maintained and protected in the same." Section 9, 14 Stat. 253. *See also*, the Desert Land Act of 1877. 19 Stat. 377 (1877), as amended, 43 U.S.C. § 321 (1970). The Reclamation Act of 1902 provides that "[N]othing in this Act shall be construed as effecting to intended to effect or to in any way interfere with the laws of any state or territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder . . ." 32 Stat. 390.

The Wallop Amendment to the Clean Water Act unequivocally reaffirmed congressional deference to state water law:

(Cont'd)

of these citations shows that they are limited to actions which seek pre-enforcement review of response actions, or administrative orders. Such actions necessarily require the EPA to expend its resources on litigation. Because the instant case does not seek review of EPA orders, and does not name EPA as a party, it does not fall within the body of claims which Congress wanted to forestall by enacting § 9613(h).

5. The Petitioner argues that the Ninth Circuit's decision conflicts with this Court's decisions regarding the complete pre-emption doctrine because claims which fall within the scope of § 9659(a)(1) are pre-empted. Because, the Respondents did not file an action under § 9659(a)(1), a discussion of the pre-emptive force of this statute is irrelevant.

Next, Petitioner argues that the Ninth Circuit's failure to

(Cont'd)

> It is the policy of Congress that the authority of each state to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any state.

Clean Water Act, Section 101(g), 33 U.S.C. Section 125(g).

Federal deference to state water law is so extensive that Congress has waived its sovereign immunity and submitted to adjudication of federal water rights in state court. The McCarran Amendment allows the United States to be joined as a party in state adjudication efforts. 43 U.S.C. § 666.

In summary, "where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law." *United States v. New Mexico*, 438 U.S. 696, 702, 98 S. Ct. 3012, 57 L. Ed. 2d 1052, 1058 (1978).

find complete federal pre-emption under § 9659(h) conflicts with this Court's decision in *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968); *Caterpillar, Inc. v. Williams*, 482 U.S. 386 and *Metropolitan Ins. Co. v. Taylor*, 481 U.S. 58 (1987). Petitioner's Brief at 20.

Although Petitioner does not explain how the Ninth Circuit's decision violated this Court's rulings in *Avco* and *Caterpillar*, a review of these cases suggests that the Petitioner's argument is without substance. In order for § 9659(h) to pre-empt state law, its pre-emptive force must be "so 'extraordinary' that it 'converts an ordinary state common law complaint into one stating a federal claim.' " *Caterpillar*, 482 U.S. at 393. Section 9659(h) explicitly preserves all state law causes of action except those time barred by § 9613(h). At most, § 9613(h) simply halts certain categories of potential state claims (*i.e.* challenges and reviews of § 106 Orders by EPA). "[T]he fact that a defendant might ultimately prove that a plaintiff's claims are pre-empted . . . does not establish that they are removable to federal court." *Caterpillar*, 42 U.S. 398.

In *Avco Corp. v. Aero Lodge*, 390 U.S. 557, 20 L. Ed. 2d 126, 88 S. Ct. 1235 (1968), this Court held that "the Labor Management Relations Act expressly furnishes some substantive law" to replace the Tennessee law which formed the basis of the original act. *Avco Corp.* at 558, citing *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-457, 1 L. Ed. 2d 972 at 980, 77 S. Ct. 912. Because § 9613(h) does not provide substantive federal law to replace the state law it purports to pre-empt, complete federal pre-emption does not exist.

Finally, Petitioner argues that the Ninth Circuit's decision conflicts with this Court's ruling in *Metropolitan Life Ins. Co. v. Taylor*. Specifically, Petitioner asserts that there is enough evidence of congressional intent to conclude that § 9613(h) pre-

empts all state law causes of action. In *Taylor*, this Court held that "explicit direction from Congress" was necessary to conclude that complete federal pre-emption exists. 481 U.S. at 63.

The plain language of § 9659(h) evidences congressional intent to *avoid* pre-emption of state law claims, not to replace them with a new body of federal common law.

II.

CHALLENGES UNDER 42 U.S.C. § 9613(h)

1. Petitioner argues that the circuits are divided regarding what claims constitute "challenges to [a] removal or remedial action" under 42 U.S.C. § 9613(h). Petitioner contends that the Ninth and Tenth Circuits require a showing that the proposed action result in a delay of the cleanup before a challenge can be deemed to occur, while the First and Fifth Circuits have articulated a standard which does not require delay.

Congress enacted § 9613(h) to "prevent private responsible parties from filing dilatory, interim lawsuits which have the effect of slowing down or preventing the EPA's cleanup activities." H.R. Rep. No. 253(I), 99th Cong., 2d Sess. 266 (1985).

Petitioner cites *Reardon v. United States*, 947 F.2d 1509, 1514, (1st Cir. 1991), for the proposition that delay was not a component of the first circuit's challenge analysis under § 9613(h). *Reardon* involved a landowner's effort to remove a lien placed upon his property by the EPA. After deciding that placement of the lien was an enforcement activity within the meaning of CERCLA, the *Reardon* court concluded that challenges "to the merits of particular liens" conflicted with congressional intent "that cleanup of substances that endanger

public health would be delayed if EPA were forced to litigate each detail of its removal and remedial plans before implementing them." 947 F.2d 1513. The *Reardon* decision hinged on a belief that pre-enforcement review, even if it did not specifically ask for a delay, would divert EPA's resources from cleanup to litigation, thereby slowing down the cleanup. The First Circuit's analysis was no different from that of the Ninth Circuit's in this case, and the Tenth Circuit in *United States v. State of Colorado*, 990 F.2d 1565 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994). Ultimately, delay is an essential component of the standard by which potential challenges are measured, even if the overt purpose of the action is not to cause delay.

Petitioner next argues that *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380 (5th Cir. 1989) conflicts with decisions of the Ninth and Tenth Circuits because it does not require that delay occur for an underlying action to be a challenge under § 9613(h). The plaintiff in *Voluntary Purchasing* asked for a declaratory judgment regarding its liability for EPA response actions. The action was filed after the EPA sent the plaintiff a number of letters indicating it was liable for cleanup costs. Although a declaratory judgment action would not have directly delayed the cleanup, the court held that such review was prohibited by § 9613(h) because the statute was "designed to preclude piecemeal review and excessive delay of cleanup." 889 F.2d at 1390, citing 132 Cong. Rec. S14928 (daily ed. Oct. 3, 1986). The court concluded that "if PRPs were allowed to file suits for declaratory judgment prior to cost recovery suits being filed by the EPA, much of the EPA's time and resources could end up being allocated to litigation in this area." *Id.* Piecemeal litigation of such lawsuits would distract the EPA from its primary mission, which is to clean up hazardous wastes.

Exhaustion of EPA resources through piecemeal litigation

is not an issue in the instant case because EPA will not be involved in Respondents' state law action against ARCO. The EPA has noted in the instant case that:

> the assertion of state law damages claims against ARCO for its own conduct does not defeat Congressional intent. The protection of water rights does not conflict with the Congressional objective to protect the public health and welfare in the environment through enactment of CERCLA ... if performance of a CERCLA response action requires prevention of injury to water rights, then placing the cost of injury prevention on responsible parties does not conflict with CERCLA.

CR 101 at 18.

Petitioner contends that "had the Ninth Circuit applied the tests of [the First and Fifth Circuits] it would have concluded that respondents' claims 'challenge' the response action EPA has selected." Petitioner's Brief at 23. Petitioner's assertion is untrue. Respondents' surviving claims articulate only state court causes of action, and do not require judicial review of response actions selected by the EPA.

2. Petitioner next argues that certiorari is appropriate because the Ninth Circuit stated that "although determination of whether ARCO's diversions were 'wrongful' . . . may require examination of the EPA's orders, resolution of the damage claim would not involve altering the terms of the cleanup order." Respondents' Appendix A, p. 8a. Petitioner contends that this view conflicts with the second element of § 9613(h) which precludes "review of 'any order issued under § 9606(a)' of this

title." Petitioner's Brief at 13. Petitioner's contention is nothing more than an argument that a federal defense to state law claims creates pre-emption, a notion that has been repeatedly rejected by this court. *Franchise Tax Board,* 463 U.S. at 13; *Merrell Dow,* 478 U.S. at 808.

Even if reference to the EPA's orders is necessary to resolve Respondents' state law claims, such reference is not tantamount to the "review" prohibited by § 9613(h). This Court has previously held that a breach of contract action did not "arise under" § 301 of the Labor Management Relations Act, where resolution of the plaintiffs' claims was "not substantially dependent upon interpretation of [a] collective bargaining agreement." *Caterpillar,* 482 U.S. 386 at 395. Similar results were reached in *Mayor and Council v. Klockner & Klockner,* 811 F. Supp. 1039, 1055 (D.N.J. 1993) where the court concluded that "even if 'review' of the EPA's actions were eventually necessary to determine whether an . . action could proceed against the defendants, this would not be a challenge to the EPA's activities as such, but rather a determination of whether a private action could proceed against the defendants." The Court in *Franchise Tax Board* noted that:

> [E]ven under section 301 of the [LRMA] we have never intimated that an action merely relating to a contract within the coverage of section 301 arises exclusively under that section. For instance, a state battery suit arising out of a violent strike would not arise under section 301 simply because the strike may have been a violation of an employer union contract.

463 U.S. at 29 n. 28.

Under the Petitioners' view of § 9613(h), all state law tort claims would be pre-empted. A plaintiff injured by a negligently operated cement truck delivering concrete to a Superfund site would be obligated to file her complaint in federal court, where it would be summarily dismissed. Such a result was never intended by Congress.

Petitioner argues that Respondents' state law damages claims are a challenge to the cleanup within the meaning of § 9613(h). In its briefing on this issue before the district court, the EPA noted that "compliance with requirements of both CERCLA and state water law is not impossible . . . In fact, ARCO does not claim that compliance with both CERCLA and Montana water law is impossible." CR 101 at 16. The Ninth Circuit found that "ARCO could comply with the [EPA's] order by buying storage water or senior water rights from others." Respondent's Appendix A, p. 8a. The Ninth Circuit's decision is consistent with this Court's ruling that "[S]tate law is pre-empted to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 182 (1983), citing in part *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963).

It is impossible for Respondents' complaint to be a challenge, when the law which forms the basis of the complaint is consistent with the law which EPA has ordered ARCO to obey. Moreover, Petitioner's claim to an impossibility defense requires a factual inquiry,[4] which is not the same as an inquiry into jurisdiction. *Lingle v. Norge*, 486 U.S. 399, 407, 100 L. Ed. 2d 410, 108 S. Ct. 1877, 1883 (1988).

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4. "All the cases involving dismissal under § 113(h) involve actions brought *against the EPA* which the plaintiff sought to enjoin or otherwise challenge a remedy pursued by the EPA." *Mayor and Council v. Klockner & Klockner*, 811 F. Supp. 1039, 1055 (D.N.J. 1993).

3. Petitioner next contends that making it subject to state law claims for compensatory and punitive damages would conflict with this Court's decision in *International Paper Co. v. Oullette*, 479 U.S. 41 (1987). Petitioner's theory is that successful prosecution of such claims would force it to "change its methods of doing business," presumably by putting a halt to its illegal activities. Petitioner's Brief at 24 (citing *Oulette*, 479 U.S. at 495).

The EPA does not agree with this view. In its briefing before the district court in this case, the EPA wrote that congressional requirements,

> to protect the public health and environment do not shield a regulated person from liability under state law intended to achieve different goals.

CR 101 at 17. This issue requires no further discussion.

Petitioner also asserts that *International Paper Co. v. Oullette* enunciates a *per se* ban on compensatory and punitive damages suits against polluters. Petitioner's Brief at 24. *International Paper* involved a lawsuit by Delaware plaintiffs against a New York defendant which was releasing pollution into water that flowed into Delaware. Although, the defendant had previously obtained a discharge permit under New York law, the plaintiffs brought suit in Delaware asserting compensatory and punitive damages claims under Delaware law. This Court held that the Delaware plaintiffs needed to base their compensatory and punitive damages claims on New York law, because the polluter's discharge permit had been issued under New York law. Central to the Court's analysis was a concern about the conflicts inherent in using Delaware law to review a New York discharge permit. "Application of an affected state's law to an out-of-state

source . . . would undermine the important goals of efficiency and predictability in the [New York] permit system." 479 U.S. at 496. Contrary to the Petitioner's assertions, the plaintiffs were not stopped "from bringing a nuisance claim pursuant to the law of the source state" and were allowed to continue their action in Delaware courts. *Id.* at 499. This Court did not hold that compensatory and punitive damages claims should be prohibited because they might force a change in a polluter's conduct.

CONCLUSION

The Petitioner's request for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED AUGUST 17, 1995

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THOMAS A. BECK; MELVIN R. BECK; ROBERT EVANS, *Plaintiffs-Appellants,* v. ATLANTIC RICHFIELD COMPANY, a Delaware Corporation; and THE MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS, *Defendants-Appellees.*	No. 94-35487 D.C. No. CV-92-00036-PGH
THOMAS A. BECK; MELVIN R. BECK; ROBERT EVANS, *Plaintiffs-Appellees,* v. ATLANTIC RICHFIELD COMPANY, *Defendant-Appellant.*	No. 94-35551 D.C. No. CV-92-00036-PGH OPINION

Appendix A

WEST SIDE DITCH COMPANY, a Montana Corporation; CITY OF DEER LODGE; RONALD KELLY; JERRY RUTLEDGE; CHARLES BECK; RICHARD FORSON; GEORGE REISTAD, *Plaintiffs-Appellants,* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Intervenor-Appellee,* v. ATLANTIC RICHFIELD COMPANY, a Delaware corporation; MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS, *Defendants-Appellees.*	No. 94-35539 D.C. No. CV-91-00002-PGH
WEST SIDE DITCH COMPANY, a Montana Corporation; CITY OF DEER LODGE; RONALD KELLY; JERRY RUTLEDGE; CHARLES BECK; RICHARD FORSON; GEORGE REISTAD, *Plaintiffs-Appellees,* v. ATLANTIC RICHFIELD COMPANY, a Delaware corporation, *Defendant-Appellant.*	No. 94-35552 D.C. No. CV-91-00002-PGH

Appeal from the United States District Court
for the District of Montana
Paul G. Hatfield, District Judge, Presiding

Argued and Submitted
June 6, 1995—Seattle, Washington

Appendix A

Filed August 17, 1995

Before: James R. Browning, Eugene A. Wright, and Thomas G. Nelson, Circuit Judges.

Per Curiam

SUMMARY

Real Estate/Environmental Law/ Litigation and Procedure (Civil)

The court of appeals vacated a judgment of the district court and remanded with directions to remand to state court. The court held that a downstream water user may bring a damages claim based purely on state law against a corporation that is diverting water from a river pursuant to a federal environmental cleanup order.

The corporate predecessor of appellee Atlantic Richfield Company (ARCO) discharged mining wastes into the Clark River in Montana for many years. The Environmental Protection Agency (EPA) ordered ARCO to clean up the resulting contamination pursuant the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The cleanup required ARCO to divert river water to tailing ponds, where the waste could settle. The cleaner water was released back into the river. The EPA's order specified that ARCO was not to cause any injury to vested water rights, and that the order did not alter any obligation ARCO had to pay for use of the water.

Appellant Thomas Beck and other downstream water users sued ARCO in state court, alleging that the company illegally and negligently appropriated water from the river in derogation of their senior water rights. They sought damages for

crop loss, lost profits, and property devaluation. One downstream user, West Side Ditch Company, also sought injunctive relief. ARCO removed the matter to federal district court and moved to dismiss.

The district court granted the motion, holding that Beck's claim against ARCO for damages constituted a claim against the federal government for inverse condemnation, over which the Court of Federal Claims had exclusive jurisdiction. The district court, alternatively, held that, to the extent Beck alleged that ARCO violated the EPA's order by injuring his water rights, his claim constituted a "challenge" to the cleanup and was, therefore, barred by CERCLA. Beck appealed.

[1] That Beck might have a takings claim against the government for ARCO's diversion of the water in conformity with the EPA's order did not preclude him from bringing a claim based purely on state law for diversion other than in conformity with the order.

[2] Beck's damage claim did not "challenge" the CERCLA cleanup plan and was, thus, unaffected by 42 U.S.C. § 9613(h), which limits such challenges. Although determination of whether ARCO's diversions were "wrongful" may require the district court to examine the EPA's orders, resolution of the damage claim would not involve altering the cleanup order's terms or interfere with ARCO's implementation of the cleanup.

[3] The district court did not have jurisdiction over West Side's claim for injunctive relief because the claim constituted a "challenge" to the CERCLA cleanup plan, over which the court would not have jurisdiction until the cleanup was completed.

Appendix A

COUNSEL

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John P. Davis, Poore, Roth & Robinson, P.C., Butte, Montana, for defendant-appellee ARCO.

Robert L. Klarquist, David C. Shilton, Department of Justice, Washington, D.C., for intervenor-appellee EPA.

OPINION

PER CURIAM:

A group of water users along the Clark Fork River in southeastern Montana[1] appeal the dismissal without prejudice of their claim under Montana law against Atlantic Richfield Company ("ARCO") for compensatory damages for diversion of water from the River. ARCO cross-appeals because the dismissal was without prejudice. We reverse the dismissal and order the district court to remand the case to state court.

I.

ARCO's corporate predecessor discharged mining wastes into the Clark Fork River for many years. The United States Environmental Protection Agency ("EPA") ordered ARCO to clean up the resulting contamination pursuant to the Comprehensive Environmental Response, Compensation, and Liabil-

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[1]The plaintiffs are Thomas A. Beck, Melvin R. Beck, and Robert Evans ("Beck") and West Side Ditch Company, City of Deer Lodge, Ronald Kelly, Jerry Rutledge, Charles Beck, Richard Forson, and George Reistad ("West Side").

ity Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.* To implement the cleanup, the EPA ordered ARCO to divert the water into tailing ponds where the waste could settle to the bottom, allowing cleaner water to flow back into the River. The order specified that ARCO was not to cause any injury to vested water rights, and that the order did not alter any obligation ARCO might have to pay for use of the water.[2]

Plaintiffs contend the diversion diminished the amount of water available to downstream users. They filed suit in state court alleging ARCO illegally and negligently appropriated water from the River in derogation of their senior water rights, and seeking compensatory damages for crop loss, lost profits, and property devaluation. West Side also sought an injunction.[3] ARCO removed to federal court and moved to dismiss.

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[2]The order provided:

> To ensure that implementation of the remedy does not cause injury to vested water rights . . . [ARCO] shall comply with all applicable provisions of the laws of the State of Montana . . . before undertaking any remedial action which involves the interception, withdrawal, diversion, storage, capture, possession, or control of any ground water or surface water. Nothing in this Order, however, shall alter any obligation [ARCO] may have under state law to provide compensation or payment for the use of water.

[3]The EPA intervened in the West Side case because the request to enjoin the diversions implicated federal interests under CERCLA, but supported plaintiffs' right to pursue state law damage claims against ARCO. The district court held West Side's request to enjoin the diversions "challenged" the CERCLA cleanup and was therefore barred by the "timing of review" statute, 42 U.S.C. § 9613(h). West Side does not appeal that ruling.

The plaintiffs also named the Montana Department of Fish, Wildlife, and Parks ("the Department") as a defendant based on the Department's alleged diversion of water into wildlife ponds. The district court's order does not mention the Department and the Department did not appear in this appeal.

The district court held plaintiffs' claim against ARCO for damages constituted a claim against the United States for inverse condemnation over which the Court of Federal Claims had exclusive jurisdiction.[4] Alternatively, the district court held that, to the extent plaintiffs alleged ARCO had violated the EPA's order by injuring plaintiffs' water rights, plaintiffs' claim constituted a "challenge" to the cleanup and was therefore barred by CERCLA's "timing of review" provision, 42 U.S.C. § 9613(h).

We conclude from our examination of the complaint that plaintiffs do not assert a claim for inverse condemnation, nor a "challenge" to the cleanup effort. Rather, plaintiffs seek to recover damages under Montana law for violation of their water rights, a claim over which the district court lacks jurisdiction.

II.

[1] Plaintiffs do not allege a takings claim. They expressly allege a cause of action based purely on state law. Even if "[t]he facts stated also [might] have sustained a [takings] claim . . . had [the plaintiffs] elected that remedy, . . . [they] did not do so, and [they] cannot be compelled to do so." *Koratron Co. v. Deering Milliken, Inc.*, 418 F.2d 1314,

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[4]The parties dispute whether the district court dismissed the damage claims for failure to state a claim, which was converted into a summary judgment by the consideration of materials outside the complaint, or for lack of subject matter jurisdiction. We conclude the district court dismissed the damage claims for lack of subject matter jurisdiction. The district court determined the Court of Federal Claims had jurisdiction over the damage claims under the Tucker Act, which is a jurisdictional statute. *United States v. Testan*, 424 U.S. 392, 398 (1976). The court offered to transfer the damage claims to the Court of Federal Claims pursuant to 28 U.S.C. § 1631, which allows a transfer when the "court finds that there is a want of jurisdiction." *See Rowe v. United States*, 633 F.2d 799, 800-02 (9th Cir. 1980) (treating issue of whether complaint should be read as raising a Tucker Act claim as a question of jurisdiction).

1317-18 (9th Cir. 1969).[5] Contrary to the district court's assumption, the fact that plaintiffs might have a takings claim against the United States for diversion of water by ARCO in conformity with the terms of the EPA's order would not in itself preclude plaintiffs from having a state law claim against ARCO for diversion other than in conformity with the EPA's order.[6] *Cf. Myers v. United States*, 323 F.2d 580, 583 (9th Cir. 1963).

[2] Plaintiffs' damage claim does not "challenge" the CERCLA cleanup plan and is thus unaffected by CERCLA's provision limiting such challenges. 42 U.S.C. § 9613(h). Although determination of whether ARCO's diversions were "wrongful," *Tucker*, 250 P. at 15, may require examination of the EPA's orders,[7] resolution of the damage claim would not involve altering the terms of the cleanup order. If the plaintiffs prevail, the remedy would be financial compensation for

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[5]Our decision is consistent with *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312 (9th Cir. 1989). There, we held "[t]he availability of a Tucker Act remedy [for inverse condemnation] is presumed on a showing that the challenged action was authorized and for a public use." *Id.* at 1317. However, the availability of a Tucker Act remedy is not at issue here; instead, we are called upon to determine whether the plaintiffs alleged such a cause of action.

[6]If it were impossible to divert water into the ponds without injuring the plaintiffs' water rights, we might agree with the district court that the "inescapable conclusion" was that the EPA had authorized ARCO to take those rights. But because the plaintiffs own the right to use a certain amount of water for a beneficial use, not the corpus of the water itself, *Tucker v. Missoula Light & Water Co.*, 250 P. 11, 15 (Mont. 1926), ARCO could comply with the order by buying storage water or senior water rights from others.

We express no opinion on the merits of the plaintiffs' state law claims against ARCO or their potential claims against the United States.

[7]Although ARCO may defend itself by asserting that it acted within the EPA's orders, that is a question of fact, not of jurisdiction. *See Myers*, 323 F.2d at 583; *cf. Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1394-95 (9th Cir. 1988) (plaintiff may avoid federal court by relying exclusively on state law even if defendant asserts a federal defense).

lost crops and lost profits. *Id.* at 18. Such a remedy would not interfere with ARCO's implementation of the cleanup.[8] *Cf. McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 331 (9th Cir. 1995), *petition for cert. filed*, 63 U.S.L.W. 3819 (U.S. May 1, 1995) (No. 94-1807).

[3] Because plaintiffs' damage claim is based entirely on state law, the district court lacks jurisdiction unless it has jurisdiction because of West Side's claim for injunctive relief. Although the district court dismissed this claim, and West Side Ditch does not appeal that dismissal, we consider all of the claims asserted in the complaint to determine whether the district court has jurisdiction. *Harrell v. 20th Century Ins. Co.*, 934 F.2d 203, 205 (9th Cir. 1991). We conclude that the district court does not have jurisdiction over West Side's claim for injunctive relief because that claim constitutes a "challenge" to the CERCLA cleanup effort over which the district court would not have jurisdiction until the cleanup was completed. 42 U.S.C. § 9613(h); *see McClellan*, 47 F.3d at 328-30.

Because plaintiffs' claims are based solely on state law, and inclusion of the Montana Department of Fish, Wildlife, and Parks as a defendant destroys diversity, 28 U.S.C. § 1332, the district court lacks jurisdiction.[9]

VACATED AND REMANDED WITH DIRECTIONS TO REMAND TO STATE COURT.

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[8]Moreover, a citizen suit under 42 U.S.C. § 9659(a)(1) is not the plaintiffs' sole remedy against ARCO; CERCLA preserves the plaintiffs' right to pursue state law remedies. 42 U.S.C. §§ 9652(d), 9659(h); *see Stanton Road Assoc. v. Lohrey Enter.*, 984 F.2d 1015, 1021-22 (9th Cir. 1993).

[9]Our disposition renders ARCO's cross-appeal moot.

APPENDIX B — COMPLAINT DATED DECEMBER 3, 1990

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MONTANA THIRD JUDICIAL DISTRICT COURT,
DEER LODGE COUNTY

NO. _____

WEST SIDE DITCH COMPANY, a Montana corporation,

Plaintiff,

-vs-

ATLANTIC RICHFIELD COMPANY, a Delaware corporation, and THE MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS,

Defendants.

COMPLAINT

COMES NOW the Plaintiff, West Side Ditch Company, by and through the undersigned counsel and complains and alleges against Defendants as follows:

Appendix B

I.

Plaintiff, West Side Ditch Company, is a Montana corporation with its principal place of business in Deer Lodge County, Montana.

II.

Defendant, Atlantic Richfield Company, is a Delaware corporation authorized to do business in the State of Montana, and conducts business in Deer Lodge County, Montana.

III.

Defendant, Montana Department of Fish, Wildlife and Parks, is an arm of Montana State Government.

IV.

On June 28, 1889, Plaintiff's predecessor in interest constructed the West Side Ditch tapping the stream and diverting the waters from the Clark Fork of the Columbia River, claiming by Notice of Appropriation, 65 c.f.s. of water for use on Plaintiff's claimed place of use consisting of 3,470 acres located in Sections 5, 7, 8, 16, 17, 18, 19, 20, 21, and 29 of Township 7 North, Range 9 West, and Sections 29 and 32 of Township 8 North, Range 9 West, all in Deer Lodge County, Montana. The point of diversion for this water right is located in the SE 1/4 SE 1/4, Section 20, Township 6 North, Range 9 West, where a headgate and weir supplies what is commonly known as the West Side Ditch.

Appendix B

V.

On April 21, 1982, Plaintiff filed Claim No. 76G-W-092051 claiming 65 cubic feet per second (c.f.s.) of the waters of the Clark Fork of the Columbia River, also known as the Deer Lodge River.

VI.

The entire flow of Claim No. 76G-W-092051 is necessary to irrigate Plaintiff's claimed place of use. Plaintiff's land will not be productive without irrigation.

VII.

The Clark Fork of the Columbia River flows through tailing ponds controlled by ARCO, located in Sections 19, 30, and 31 of Township 5 North, Range 9 West, and Sections 25 and 36 of Township 5 North, Range 10 West.

VIII.

The Mill-Willow Bypass is a ditch that was constructed prior to 1950 to divert the waters of Mill Creek and Willow Creek in the NE 1/4 of Section 11, Township 4 North, Range 10 West. The Mill-Willow Bypass carries waters from Mill and Willow Creeks around the tailing ponds mentioned in paragraph VII. Water flowing through the Mill-Willow Bypass ultimately contributes substantially to the flows of the Deer Lodge or Clark Fork River.

Appendix B

IX.

On or about June 1, 1990, the Defendant, or Defendants, and/or their agents, began diverting water from the Mill-Willow Bypass into the tailing ponds described in paragraph VII. The diversion undertaken by the Defendants is upstream of the headgates used by the West Side Ditch Company.

X.

The Defendants' diversion and use of Mill-Willow Bypass water has severely depleted the supply of water in the Clark Fork of the Columbia River at Plaintiff's point of diversion described in paragraph IV above.

XI.

Defendants' diversions from the Mill-Willow Bypass, coupled with construction activities in the area, have substantially altered historic patterns of flow in the Clark Fork of the Columbia River.

XII.

The Defendant ARCO's negligent diversion of water from the stream materially interferes with the Plaintiff's water rights, in that the flow of the Clark Fork of the Columbia River at the Plaintiff's headgate has been severely reduced. Defendants' interference with the Plaintiff's flow of water has occurred continuously since July 1, 1990.

Appendix B

XIII.

Plaintiff has contacted Defendant ARCO and requested that it stop diversions from the Mill-Willow Bypass. Defendant ARCO deliberately and willfully refused to stop its unlawful diversions of waters flowing into the Mill-Willow Bypass.

XIV.

Due to the decreased flow of the Clark Fork, and resulting depletion of water in the West Side Ditch, Plaintiff, West Side Ditch Company, has experienced significant reduction in crop production upon its claimed place of use described in Paragraph IV above, resulting in crop loss, damages from loss of profits, and expenditures for the replacement of damaged and low yield crops.

XV.

Plaintiffs have repeatedly informed Defendant ARCO that its activities were causing injury to Plaintiffs.

XVI.

The Defendant, Atlantic Richfield Company, is not the owner of any claim for existing water rights from the sources of Silver Bow Creek, Mill Creek, Willow Creek, or the Clark Fork of the Columbia River.

XVII.

Plaintiff's right to use the water of the Clark Fork of the Columbia River and its tributaries, is paramount to any claim of the Defendants.

Appendix B

XVIII.

Mont. Code Ann. § 85-2-302 (1989) requires that "a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefore except by applying for and receiving a permit from the Department [of Natural Resources and Conservation]. The application shall be made on a form prescribed by the Department."

XIX.

As of September 28, 1990, Defendant ARCO had not applied for a permit from the Montana Department of Natural Resources and Conservation for usage of the waters of Mill Creek, Willow Creek, or Silver Bow Creek.

XX.

Mont. Code Ann. § 85-2-402 (1989) states "an appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the Department [of Natural Resources and Conservation] or if applicable of the Legislature."

XXI.

Defendant ARCO has not applied for a change in appropriation right from the Montana Department of Natural Resources and Conservation as of September 28, 1990.

Appendix B

XXII.

Defendants' impoundment of surface waters from the Mill-Willow Bypass results in less water being available for Plaintiff's diversion described in Paragraph IV above.

XXIII.

Mont. Code Ann. § 85-2-406(2) authorizes the petition for relief in district court of any person whose rights are affected by a controversy over the distribution of water from a source in which existing rights have not been determined .

Plaintiff has no adequate remedy at law;

WHEREFORE, Plaintiff prays:

1. Plaintiff's right to the waters described in its claims be declared paramount to any claims of the Defendants.

2. Defendants ARCO and the Montana Department of Fish, Wildlife and Parks be enjoined from diverting the waters of the Mill-Willow Bypass or engaging in any activity which interferes with Plaintiff's right to waters of the Clark Fork of the Columbia River.

3. That Defendants ARCO and the Montana Department of Fish, Wildlife and Parks be required to release all waters illegally impounded and stored by its dams or diversions.

4. For Plaintiff's costs of suit in this action and reasonable attorney fees .

Appendix B

5. For damages from Defendant ARCO arising from crop loss sustained as a result of Defendants' improper and unlawful diversion and depletion of the waters of Silver Bow, Mill, and Willow Creeks and the Deer Lodge River.

6. For such further relief as the Court may deem proper and just.

DATED this 3 day of December, 1990.

MOORE, O'CONNELL, REFLING
& MANOS

BY: s/ Russ McElyea
RUSS McELYEA

APPENDIX C — AMENDED COMPLAINT DATED MAY 24, 1991

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

NO. CV-91-2-BU-PGH

WEST SIDE DITCH COMPANY, a Montana corporation, CITY OF DEER LODGE, RONALD KELLY, JERRY RUTLEDGE CHARLES BECK, RICHARD FORSON, GEORGE REISTAD, and NATIONAL PARK SERVICE

Plaintiffs,

-vs-

ATLANTIC RICHFIELD COMPANY, a Delaware corporation, and THE MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS,

Defendants .

AMENDED COMPLAINT

COMES NOW the Plaintiff, West Side Ditch Company, by and through the undersigned counsel and complains and alleges against Defendants as follows:

Appendix C

I.

Plaintiff, West Side Ditch Company, is a Montana corporation with its principal place of business in Deer Lodge County, Montana. The City of Deer Lodge, Ronald Kelly, Jerry Rutledge, Charles Beck, Richard Forson, George Reistad, and the National Park Service, operators of the Grant Kohrs National Historic Site are shareholders in the West Side Ditch Company.

II.

Defendant, Atlantic Richfield Company, (ARCO) is a Delaware corporation authorized to do business in the State of Montana, and conducts business in Deer Lodge County, Montana.

III.

Defendant, Montana Department of Fish, Wildlife and Parks, is an arm of Montana State Government.

IV.

On June 28, 1889, Plaintiff's predecessor in interest constructed the West Side Ditch tapping the stream and diverting the waters from the Clark Fork of the Columbia River, claiming by Notice of Appropriation, 65 c.f.s. of water for use on Plaintiff's claimed place of use consisting of 3,470 acres located in Sections 5, 7, 8, 16, 17, 18, 19, 20, 21, and 29 of Township 7 North, Range 9 West, and Sections 29 and 32 of Township 8 North, Range 9 West, all in Deer Lodge County, Montana. The point of diversion for this water right is located in the SE 1/4 SE 1/4, Section 20, Township 6 North, Range 9 West, where a

headgate and weir supplies what is commonly known as the West Side Ditch.

V.

On April 21, 1982, Plaintiff West Side Ditch Company filed Claim No. 76G-W-092051 with the Montana Department of Natural Resources and Conservation claiming 65 cubic feet per second (c.f.s.) of the waters of the Clark Fork of the Columbia River, also known as the Deer Lodge River.

VI.

The entire flow of Claim No. 76G-W-092051 is necessary to irrigate the Plaintiff's claimed places of use. Plaintiff's land will not be productive without irrigation.

VII.

The Clark Fork of the Columbia River flows through tailing ponds controlled by ARCO and wildlife ponds controlled by Fish, Wildlife and Parks, located in Sections 19, 30, and 31 of Township 5 North, Range 9 West, and Sections 25 and 36 of Township 5 North, Range 10 West.

VIII.

The Mill-Willow Bypass is a ditch that was constructed prior to 1950 to divert the waters of Mill Creek and Willow Creek in the NE 1/4 of Section 11, Township 4 North, Range 10 West. The Mill-Willow Bypass carries waters from Mill and Willow Creeks around the ponds mentioned in paragraph VII. Water flowing through the Mill-Willow Bypass ultimately contributes substantially to the flows of the Deer Lodge or Clark Fork River.

Appendix C

IX.

On or about June 1, 1990, the Defendant, or Defendants, and/or their agents, began diverting water from the Mill-Willow Bypass into the tailing ponds described in paragraph VII . The diversion undertaken by the Defendants is upstream from the headgates used by the West Side Ditch Company. Defendant ARCO or its predecessors have also diverted the waters of Silver Bow Creek into the ponds identified by paragraph VII .

X.

The Defendants' diversion and use of the Mill-Willow Bypass, Silver Bow Creek, Mill Creek, Willow Creek, and other sources has severely depleted the supply of water in the Clark Fork of the Columbia River at Plaintiff's point of diversion described in paragraph IV above.

XI.

Defendants' diversions, coupled with their construction activities in the area, have substantially altered historic patterns of flow in the Clark Fork of the Columbia River.

XII.

The Defendant's negligent diversion of water from streams in the Deer Lodge River Basin materially interferes with the Plaintiff's water rights, in that the flow of the Clark Fork of the Columbia River at the Plaintiff's headgate has been severely reduced.

Appendix C

XIII.

Plaintiffs have contacted Defendant ARCO and requested that it stop diversions from the Mill-Willow Bypass. Defendant ARCO deliberately and willfully refused to stop its unlawful diversions of waters flowing into the Mill-Willow Bypass.

XIV.

Due to the decreased flow of the Clark Fork, and resulting depletion of water in the West Side Ditch, the Plaintiffs have experienced significant reduction in crop production upon their properties described in Paragraph IV above, resulting in crop loss, damages from loss of profits, and expenditures for the replacement of damaged and low yield crops. In addition, shareholders in the West Side Ditch Company have experienced a decrease in the value of their shares in the West Side Ditch Company, and have seen a consequent decline in the value of both their shares and their real property as a result of the Defendant's actions.

XV.

Plaintiffs have repeatedly informed Defendant ARCO that its activities were causing injury to Plaintiffs.

XVI.

The Defendant, Atlantic Richfield Company, is not the owner of any claim for existing water rights from the sources of Silver Bow Creek, Mill Creek, Willow Creek, or the Clark Fork of the Columbia River.

Appendix C

XVII.

Plaintiff's right to use the water of the Clark Fork of the Columbia River and its tributaries, is paramount to any claim of the Defendants.

XVIII.

Mont. Code Ann. § 85-2-302 (1989) requires that "a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefore except by applying for and receiving a permit from the Department [of Natural Resources and Conservation]. The application shall be made on a form prescribed by the Department."

XIX.

As of September 28, 1990, Defendant ARCO had not applied for a permit from the Montana Department of Natural Resources and Conservation for usage of the waters of Mill Creek, Willow Creek, or Silver Bow Creek.

XX.

Mont. Code Ann. § 85-2-402 (1989) states "an appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the Department [of Natural Resources and Conservation] or if applicable of the Legislature."

Appendix C

XXI.

Defendant ARCO has not applied for a change in appropriation right from the Montana Department of Natural Resources and Conservation as of September 28, 1990.

XXII.

Defendants' impoundment of surface waters from the Mill-Willow Bypass, Silver Bow Creek, Mill Creek, Willow Creek, and other sources in the Deer Lodge River Basin results in less water being available for Plaintiff's diversion described in Paragraph IV above.

XXIII.

Mont. Code Ann. § 85-2-406(2) authorizes the petition for relief in district court of any person whose rights are affected by a controversy over the distribution of water from a source in which existing rights have not been determined.

Plaintiff has no adequate remedy at law;

WHEREFORE, Plaintiffs pray:

1. Plaintiff's right to the waters described in its claims be declared paramount to any claims of the Defendants.

2. Defendants ARCO and the Montana Department of Fish, Wildlife and Parks be en joined from diverting, impounding, withdrawing, or using for any purpose waters from any stream or tributary in the Clark Fork Basin upstream of the Plaintiffs' point of diversion for which Defendants do not have water rights or

engaging in any activity which interferes with Plaintiff's right to waters of the Clark Fork of the Columbia River.

3. That Defendants ARCO and the Montana Department of Fish, Wildlife and Parks be required to release all waters illegally impounded and stored by its dams or diversions.

4. For Plaintiff's costs of suit in this action and reasonable attorney fees.

5. For damages from Defendant ARCO arising from crop loss, property devaluation and other damages sustained as a result of Defendants' improper and unlawful diversion and depletion of the waters of Silver Bow, Mill, and Willow Creeks and other sources in the Deer Lodge Basin.

6. For punitive damages arising from Defendant ARCO's willful, wanton, and reckless disregard for the rights and interests of the Plaintiffs.

7. For such further relief as the Court may deem proper and just.

DATED this 24 day of May, 1991.

MOORE, O'CONNELL, REFLING
& MANOS

BY: /s/
RUSS McELYEA

APPENDIX D — COMPLAINT DATED APRIL 29, 1992

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IN THE THIRD JUDICIAL DISTRICT COURT
FOR THE STATE OF MONTANA, POWELL COUNTY

Cause No. CV-92-51

THOMAS A. BECK, MELVIN R. BECK and ROBERT EVANS,

Plaintiffs,

v

ATLANTIC RICHFIELD COMPANY, a Delaware corporation, and THE MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS,

Defendants.

COMPLAINT

COMES NOW the above-named Plaintiffs, Thomas A. Beck, Melvin R. Beck and Robert Evans, by and through the undersigned counsel and complains and alleges against the above-named Defendants as follows:

Appendix D

GENERAL ALLEGATIONS

1. Plaintiffs are and at all times relevant to this complaint, were residents of Deer Lodge, Montana.

2. Defendant, Atlantic Richfield Company, (ARCO) is a Delaware corporation authorized to do business in the State of Montana, and conducts business in Deer Lodge County and Powell County, Montana.

3. Defendant, Montana Department of Fish, Wildlife and Parks (DFWP), is an agency of Montana State Government located in Helena, Montana.

4. Plaintiffs' and their predecessors in interest have appropriated and utilized the waters from the Clark Fork River, for irrigation purposes. The Plaintiffs have beneficially used the waters of the Clark Fork River in Section 29, Township 07 North, Range 09 West, and Section 32 of Township 07 North, Range 09 West, all in Powell County, Montana. The point of diversion for this water right is located in the SW 1/4 SE 1/4 NW 1/4 Sec. 33, Township 07 North, Range 09 West.

5. On December 18, 1981, Plaintiffs or their predecessors in interest filed Claim No. 76G-W-100077-00 with the Montana Department of Natural Resources and Conservation claiming 15.00 c.f.s. of the waters of the Clark Fork River, also known as the Deer Lodge River. The 15.00 c.f.s. has been historically utilized by the Plaintiffs and their predecessors for irrigation purposes since September 28, 1966.

6. The entire flow of Claim No. 76G-W-100077-00 is necessary to adequately irrigate the Plaintiffs' claimed places of use. Plaintiffs' land will not be productive without irrigation.

Appendix D

7. The Clark Fork River flows in the vicinity of certain tailings ponds controlled by ARCO and wildlife ponds controlled by Fish, Wildlife and Parks, located in Sections 19, 30, and 31 of Township 5 North, Range 9 West, and Sections 25 and 36 of Township 5 North, Range 10 West.

8. The Mill-Willow Bypass is a ditch that was constructed prior to 1950 to divert the waters of Mill Creek and Willow Creek in the NE 1/4 of Section 11, Township 4 North, Range 10 West. The Mill-Willow Bypass carries waters from Mill and Willow Creeks, tributaries of the Clark Fork River, around the ponds mentioned in Paragraph 7. Water flowing through the Mill-Willow Bypass ultimately contributes substantially to the flows of the Deer Lodge or Clark Fork River.

9. On or about June 1, 1990, the Defendants, and/or their agents began diverting water from Mill-Willow Bypass into the tailing ponds described in Paragraph 7. The diversion undertaken by the Defendants is upstream from the diversion used by the Plaintiffs. Defendant ARCO, or its agents, have also diverted the waters of Silver Bow Creek into the ponds identified by Paragraph 7.

10. The Defendants, ARCO and DFWP are not the owners of any claim for existing water rights from the sources of Silver Bow Creek, Mill Creek, Willow Creek, or the Clark Fork River.

11. The Defendants ARCO and DFWP have not applied for a water rights permit from the Montana Department of Natural Resources and Conservation (DNRC) for usage of the waters of Mill Creek, Willow Creek, Silver Bow Creek, or the Clark Fork River. Likewise, the Defendants ARCO and DFWP have not received a water rights permit from the DNRC to divert any waters of said sources.

12. Defendants ARCO and DFWP have not applied for a change in appropriation right with the Montana Department of Natural Resources and Conservation (DNRC). Likewise, no change in any appropriation right has been approved by the DNRC.

COUNT I

13. Plaintiffs reallege each and every one of the allegations contained in the preceding paragraphs.

14. The Defendants' illegal diversions and use of the Mill-Willow Bypass, Silver Bow Creek, Mill Creek, Willow Creek, and other sources contrary to Montana law, have severely depleted the supply of water in the Clark Fork River at Plaintiffs' point of diversion described in Paragraph 4 above.

15. Defendants' illegal diversions in the area have substantially altered historic patterns of flow in the Clark Fork River. As a result of said illegal diversions, the Plaintiffs have been deprived of water available at Plaintiffs' point of diversion described in Paragraph 4 above.

16. The Defendants' diversion of water from streams in the Clark Fork Basin materially and substantially interferes with the Plaintiffs' water rights, in that the flow of the Clark Fork River at the Plaintiffs' points of diversion have been severely reduced and depleted.

17. Due to the decreased flow of the Clark Fork, and resulting depletion of water available at their diversion points, the Plaintiffs have experienced significant reduction in crop production upon their properties described in Paragraph 4 above,

resulting in crop loss, damages from loss of profits, and expenditures for the replacement of damaged and low yield crops. In addition, the Plaintiffs have experienced a decrease in the value of their real property as a result of the Defendants' actions.

18. As a result of Defendants' illegal use of water from streams in the Clark Fork River Basin, the Plaintiffs have suffered damages.

COUNT II

19. Plaintiffs reallege each and every one of the allegations contained in the preceding paragraphs.

20. The Defendants' negligent diversions and use of the Mill-Willow Bypass, Silver Bow Creek, Mill Creek, Willow Creek, and other sources contrary to Montana law, have severely depleted the supply of water in the Clark Fork River at Plaintiffs' point of diversion described in Paragraph 4 above.

21. Defendants' negligent diversions in the area have substantially altered historic patterns of flow in the Clark Fork River. As a result of said negligent diversions, the Plaintiffs have been deprived of water available at Plaintiffs' point of diversion described in Paragraph 4 above.

22. The Defendants' negligent diversion of water from streams in the Clark Fork Basin materially and substantially interferes with the Plaintiffs' water rights, in that the flow of the Clark Fork River at the Plaintiffs' points of diversion have been severely reduced and depleted.

Appendix D

23. Due to the decreased flow of the Clark Fork, and resulting depletion of water available at their diversion points, the Plaintiffs have experienced significant reduction in crop production upon their properties described in Paragraph 4 above, resulting in crop loss, damages from loss of profits, and expenditures for the replacement of damaged and low yield crops. In addition, the Plaintiffs have experienced a decrease in the value of their real property as a result of the Defendants' negligent actions.

24. As a result of Defendants' negligent use of water from streams in the Clark Fork River Basin, the Plaintiffs have suffered damages .

COUNT III

25. Plaintiffs reallege each and every one of the allegations contained in the preceding paragraphs.

26. Defendant ARCO has been repeatedly contacted and requested that it stop diversions from the Mill-Willow Bypass. Defendant ARCO deliberately and willfully refused to stop its unlawful diversions of waters flowing into the Mill-Willow Bypass.

27. Defendant ARCO has been repeatedly informed that its activities were causing injury to water users on the Clark Fork River.

28. Despite the above-mentioned efforts, the Defendants have continued to illegally divert the surface waters from the Mill-Willow Bypass, Silver Bow Creek, Mill Creek, Willow Creek, and other sources in the Clark Fork River Basin which has

resulted in less water being available for Plaintiffs' diversion described in Paragraph 4 above.

29. As a result of the Defendants wanton, willful and reckless conduct in illegally diverting waters in the Clark Fork River Basin, the Plaintiffs have been injured and Plaintiffs are entitled to punitive damages.

COUNT IV

30. Plaintiffs reallege each and every one of the allegations contained in the preceding paragraphs.

31. Plaintiffs' right to use the water of the Clark Fork River and its tributaries is superior to any claimed use by the Defendants.

32. Montana law authorizes this action for relief in district court of any person whose rights are affected by a controversy over the distribution of water, and state law authorizes damages for the allegations contained in this complaint.

WHEREFORE, Plaintiffs pray for relief as follows:

1. For monetary damages from Defendants ARCO and DFWP arising from crop loss, property devaluation and other damages sustained as a result of Defendants' illegal, negligent and unlawful diversion and repletion of waters of Silver Bow, Mill, and Willow Creeks and other sources in the Clark Fork River Basin. Such damages shall be shown and determined at trial.

2. For punitive damages arising from Defendants' willful, wanton, and reckless disregard for the rights and interest of the Plaintiffs.

Appendix D

3. For Plaintiffs' costs of suit in this action and reasonable attorney's fees.

4. For such further relief as the Court may deem proper and just.

Dated this 29th day of April, 1992.

By s/ John E. Bloomquist
John E. Bloomquist, Esq.
Attorney for Plaintiffs
Thomas Beck, Melvin Beck and Robert Evans

Plaintiffs hereby demand a jury trial to try the cause.

By s/ John E. Bloomquist
John E. Bloomquist, Esq.
Attorney for Plaintiffs
Thomas Beck, Melvin Beck and Robert Evans

APPENDIX E — RELEVANT STATUTES

42 U.S.C.A. § 9613 (1995) Civil proceedings

(b) Jurisdiction; venue

Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

(h) Timing of review

No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under 9606(a) of this title, in any action except one of the following:

(1) An action under section 9607 of this title to recover response costs or damages or for contribution.

(2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.

(3) An action for reimbursement under section 9606(b)(2) of this title.

(4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

(5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

42 U.S.C.A. § 9659 (1995) Citizens suits

(a) Authority to bring civil actions

Except as provided in subsections (d) and (e) of this section and in section 9613(h) of this title (relating to timing of judicial review), any person may commence a civil action on his own behalf —

> (1) against any person (including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter (including any provision of an agreement under section 9620 of this title, relating to Federal facilities); . . . .

(h) Other rights

This chapter does not affect or otherwise impair the rights of any person under Federal, State, or common law, except with respect to the timing of review as provided in section 9613(h) of

this title or as otherwise provided in section 9658 of this title (relating to actions under State law).

Supreme Court, U.S.
F I L E D
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CLERK

No. 95-1387

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ATLANTIC RICHFIELD COMPANY, a Delaware Corporation,
Petitioner,
v.
WEST SIDE DITCH COMPANY, a Montana Corporation; CITY OF DEER LODGE; RONALD KELLY; JERRY RUTLEDGE; CHARLES BECK; RICHARD FORSON; GEORGE REISTAD; THE MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; THOMAS A. BECK; MELVIN R. BECK; ROBERT EVANS,
Respondents.

On Petition for a Writ of Certiorari to the
Ninth Circuit Court of Appeals

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REPLY OF THE PETITIONER

I.

1. Respondents do not refute ARCO's showing of significant conflicts, among the courts of appeals, and with this Court's decisions, concerning the test for complete preemption. Pet. 14-17, 19-21. Respondents also do not challenge ARCO's showing that Congress specifically intended that *all* litigation seeking to challenge a response action or obtain review of pertinent EPA orders before and during a clean-up -- regardless of whether the claim arises under federal or state law -- would be removable to federal court and subject to scrutiny under section 9613(h) of CERCLA, 42 U.S.C.A. § 9613(h) (1995). Pet. 18-19. Instead, respondents offer a host of arguments that confuse or misapprehend the controlling legal principles, misunderstand ARCO's arguments, or misstate the record.

2. Respondents overlook the significant conflict among the circuit courts in applying the first prong of the complete preemption doctrine, *i.e.*, whether the federal statute "'displace[s] entirely any state cause of action' within the scope of the federal statutory provision." Pet. 14.

a. For instance, respondents dismiss ARCO's reliance on *Rice v. Panchal*, 65 F.3d 637 (7th Cir. 1995), Pet. 15, on grounds that *Rice* is consistent with this Court's decision in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987). Opp. 10. The point is that *Rice* conflicts with decisions of other circuit courts. Pet. 15. Respondents' claim that *Rice* comports with *Taylor* underscores the significance of the conflicts among the circuit courts and the need for this Court's review. Pet. 14-15, 19-21.

b. Respondents misread *Aaron v. National Union Fire Ins. Co.*, 876 F.2d 1157 (5th Cir. 1989), *cert. denied*, 493 U.S. 1074 (1990). Opp. 10. *Aaron* held that "[t]here is no federal cause of action the plaintiffs could have pleaded" under the federal statute at issue in lieu of their state law claims. 876 F.2d 1165. Thus, the Fifth Circuit required that the federal statute afford a cause of action that replaces or, in the words of the Sixth Circuit, supersedes the state law claim. *Id.* at 1164-65; *Warner v. Ford Motor Co.*, 46 F.3d 531, 534 (6th Cir. 1995) (*en banc*).

3. Respondents' allegations can be read to support a claim under section 9659(a)(1) of CERCLA, 42 U.S.C.A. § 9659(a)(1) (1995), permitting the Court to consider the test adopted by the Third, Fifth and Sixth Circuits for the first prong of the complete preemption doctrine. Pet. 15-16.

a. Respondents assert this inquiry does not arise here because "as masters of their complaint, [respondents] did not ask for relief under § 9659(a)(1)." Opp. 11. But the doctrine of complete preemption always involves a claim that is pled as a state law claim; the issue is whether, notwithstanding the plaintiff's attempt to cloak the claim in a state-law garb, it is, in fact, a federal law claim. *Taylor*, 481 U.S. at 63-67. Pet. 14.

b. In fact, respondents confirm that their allegations can be read as claims for violation of the EPA orders, and thus as within the scope of section 9659(a)(1). Opp. 3, 4; *id.* at 24 ("the law which forms the basis of the complaint is consistent with the law which EPA has ordered ARCO to obey").

4. Section 9659(h), 42 U.S.C.A. § 9659(h) (1995), and its incorporation of section 9613(h) by reference, permits the Court to review the Seventh and Eighth Circuits' test for the first prong of the complete preemption doctrine. Pet. 16-17.

a. Resorting to principles of "ordinary preemption", respondents argue that section 9659(h) was intended to preserve, not preempt, state causes of action. Opp. 12-13. This argument is irrelevant because ARCO relies on complete preemption, not ordinary preemption. Under the complete preemption doctrine, respondents' claims are necessarily federal in character, regardless of how they were pled, and therefore, are removable to federal district court. Pet. 14. Ordinary preemption does not transform the state law character of the claims; it operates as a defense to them and is not a basis for removal. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 12 (1983).

b. Respondents' arguments concerning *Rice*, 65 F.3d at 640, and *Deford v. Soo Line*, 867 F.2d 1080, 1085-86 (8th Cir.), *cert. denied*, 492 U.S. 927 (1989), Opp. 13, reflect respondents' failure to understand section 9659(h) and how it affects state law claims within its scope. Because section 9659(h) displaces those claims and furnishes a modified federal remedy in their place, Pet. 16-17 & 18-23, section 9659(h) is precisely the kind of statutory provision that satisfies the test *Rice* and *Deford* used for the first prong of the complete preemption doctrine.

5. Respondents misapprehend ARCO's arguments concerning the division in the circuit courts as to the second prong of the complete preemption doctrine. Pet. 17-19.

a. Respondents attempt to gloss over the conflict between the Third and Eighth Circuits on this issue. Opp. 14. Yet the decisions of these courts belie respondents' conclusory assertions: each describes the test differently, and after applying its respective test, each reaches a different conclusion as to congressional intent under the same statute, the Railway Labor Act. *See Railway Labor Executives Ass'n v. Pittsburgh & Lake Erie R. Co.*, 858 F.2d 936, 942 (3d Cir. 1988); *Deford*, 867 F.2d at 1085-86.

b. Respondents question the need to consult the legislative history to ascertain congressional intent. Opp. 14, 15. This Court has emphasized that complete preemption requires "explicit direction from Congress" and has looked not only to statutory language but also to legislative history for that direction. *Taylor*, 481 U.S. at 64-65. Respondents offer no persuasive response to ARCO's showing that Congress gave such direction as to state law claims within the scope of section 9659(h). Pet. 18-19.

(1) ARCO's position is not, as respondents contend, that section 9659(h) "mak[es] all federal, state, or common law claims removable to federal court" in the abstract. Opp. 15; *see also id.* at 24 (arguing that under ARCO's view, "all state law tort claims would be pre-empted"). Rather, section 9659(h) makes claims within its scope, including state law claims such as respondents', removable to federal court *for scrutiny under section 9613(h)*. Pet. 18. State law claims that are within the scope of section 9659(h) and that may be found to be "challenges" to a response action or to seek "review" of a section 9606(a) order within the meaning of section 9613(h) are subject to removal.

(2) If the plaintiff opposes removal and files a motion to remand to state court, the federal court will decide the issue whether the claims constitute "challenges" to response actions or seek "review" of a section 9606(a) order. If the federal court answers this question in the negative, then the motion to remand will be granted and the claims will go forward in state court. If the federal court concludes that the claims are "challenges" or seek "review" of an order, then the motion to remand will be denied and the complaint will be dismissed, without prejudice to refiling at the conclusion of the clean-up. This procedure, which simply assures

that section 9613(h) is given effect, is precisely the "result . . . intended by Congress." Opp. 24. *See* Pet. 18-19.[1]

c. Respondents offer no response to ARCO's showing that Congress specifically intended that claims within the scope of section 9659(h) filed in state court would be removable to federal court. Pet. 19.

(1) Respondents' reliance on Representative Glickman's comments concerning diversity of citizenship, Opp. 16, is misplaced. He specifically explained that "this reference to 28 U.S.C. 1332 does *not* create any additional rights or opportunities to obtain review of a Superfund response action." 132 Cong. Rec. H9582 (daily ed. Oct. 8, 1986) (Rep. Glickman) (emphasis added). Thus, respondents' hypothetical case -- a state law cause of action filed in state court, Opp. 16 -- is subject to removal to federal court for scrutiny under section 9613(h), as Representative Glickman's other comments confirm. Pet. 19; *see also supra* at 3.

(2) Respondents also argue that CERCLA was not intended to preempt other law in general, Opp. 16, and that Congress has traditionally deferred to state water law, *id.* at 17 n.3. Neither of these arguments is pertinent to the issue before the Court. ARCO is arguing that under the doctrine of complete preemption, respondents' state law claims are subject to removal to federal district court and analysis under section 9613(h). Pet. 14-25. If section 9613(h) is found to apply, respondents' claims will not be extinguished, but rather altered as to when they can be brought and the relief they can afford. Pet. 15-21.

(3) Respondents misstate EPA's views "concerning the remedy available to the [r]espondents in the instant case." Opp. 16. Respondents' quotation from a brief the United States filed in the district court has some omissions. The brief reads as follows:

> To the extent that these claims do not challenge or seek to block the response action at the Warm Springs Ponds operable unit, they do not

---

[1]Respondents' hypothetical negligence case, Opp. 24, would be subject to this procedure. The outcome would depend on whether the case was a "challenge" to the response action or sought "to review" the EPA order. If not, the case would not be removed or would be remanded to state court.

appear to implicate CERCLA. *By submitting that this Court lacks jurisdiction to forbid ARCO's performance of the response action at the Mill-Willow Bypass and the Warm Springs Ponds, the United States does not take a position on whether plaintiffs are entitled to some form of relief (such as money damages) to redress an alleged violation of state-law water rights.*[18] If, in fact, plaintiffs' water rights have been impaired, CERCLA does not bar a remedy unless that remedy would involve review of the propriety of, or possible injunction against, the performance of an ongoing CERLCA response action.

[18] *Based upon EPA's review of the evidence, EPA has decided not to bring an action to enforce the terms of the section 106(a) order requiring ARCO to comply with Montana state water law.*

Brief of Intervenor United States in Support of Dismissal of Claims for Injunctive Relief, filed Feb. 21, 1992, at 17-18 (emphasis in italics added). These omissions (shown in italics) refute respondents' implicit suggestion, Opp. 3, 24, that EPA concurred in their position that ARCO was viclating EPA's orders.

6. ARCO showed that the Ninth Circuit's decision to remand conflicts with this Court's decisions, regardless of whether respondents' claims fall within section 9659(a)(1) or section 9659(h). Pet. 19-21.

a. Respondents again assert that they did not plead any section 9659(a)(1) claims. Opp. 18. But the issue is whether the claims are in fact federal law claims regardless of how respondents described them. *See supra* at 2; Pet. 14. The claims fall within section 9659(a)(1), Pet. 15-16 & n.5, and the Ninth Circuit's decision to remand them conflicts with *Taylor*, 481 U.S. at 64-66. *See* Pet. 20.

b. Respondents' arguments concerning section 9659(h) and *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987), Opp. 18-19, again confuse ordinary preemption and complete preemption. *See supra* at 2. *Caterpillar*, 482 U.S. at 391 n.4, is pertinent because it rejects the notion that federal law must "both displace and supplement state law." Pet. 20.

c. Contrary to respondents' assertions, Opp. 19, section 9659(h) satisfies *Avco Corp. v. Aero Lodge*, 390 U.S. 557 (1968), and claims within the scope of section 9659(h) "necessarily 'arise[ ] under' federal law," *Franchise Tax Board*, 463 U.S. at 24. *See* Pet. 18-19, 20-21. Any other

conclusion would defeat Congress' express directive that such claims are removable to federal court for scrutiny under section 9613(h). Pet. 18-19. As for respondents' effort to distinguish *Taylor*, Opp. 19-20, the text and legislative history of section 9613(h) surely constitute the requisite "explicit direction from Congress" to permit removal that *Taylor* requires. *Taylor*, 481 U.S. at 64; Pet. 18-19, 21.

7. Respondents suggest that ARCO is foreclosed from relying on the doctrine of complete preemption because the Ninth Circuit did not specifically address it. Opp. i, 1, 6, 7, 9. In fact, ARCO (a) removed the *West Side* case on grounds that the case was within the exclusive jurisdiction of the federal district court under section 9613(b), 42 U.S.C.A. § 9613(b) (1995), and (b) relied on the doctrine of complete preemption in opposing the motion to remand. Pet. 9. Similarly, ARCO removed the *Beck* action on the ground that the federal district court had subject matter jurisdiction, and opposed the motion to remand on the ground that the claims had been artfully pled to avoid federal subject matter jurisdiction. *Id.* at 11. In the Ninth Circuit, ARCO argued, *inter alia*, that to the extent respondents asserted that ARCO had not routed and treated the water in accordance with EPA's orders, their remedy was a suit under section 9659(a)(1), and therefore barred under section 9613(h). Briefs of Atlantic Richfield Co., 9th Cir. Case Nos. 94-35539, 94-35552, 94-35487 and 94-3555, filed Oct. 11, 1994, at 32-33.

"Once a federal claim is presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 112 S. Ct. 1522, 1532 (1992); *Lebron v. National R. R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995). In light of the arguments ARCO made below, ARCO now "possesses the ability to frame the question to be decided [by this Court] in any way [it] chooses, without being limited to the manner in which the question was framed below." *Yee*, 112 S. Ct. at 1532.

II.

1. The lower courts are divided on what claims constitute "challenges" to a response action or seek "to review [a section 9606(a)] order" within the meaning of section 9613(h). Pet. 21-23. As to the former provision, ARCO showed that the circuits are divided over whether "challenges" should be read according to its plain meaning, or should be subject to limitations such as those the Ninth Circuit imposed here. Pet. 22-23.

a. Respondents misread *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380 (5th Cir. 1989), and *Reardon v. United States*, 947 F.2d 1509 (1st Cir. 1991) (*en banc*). Both cases squarely reject the notion that "delay" of a cleanup is a prerequisite to finding a "challenge" within the meaning of section 9613(h). 889 F.2d at 1388-89; 947 F.2d at 1513. Both interpret "challenge" according to its ordinary meaning, noting that such an interpretation is most consistent with (a) the plain language of section 9613(h); (b) Congress' concern, reflected in the legislative history, that pre-enforcement review would increase response costs and discourage settlements and voluntary cleanups; and (c) the recognition that pre-enforcement review "could force the EPA to confront inconsistent results." 889 F.2d at 1388-90; 947 F.2d at 1512-13.

b. Respondents' assertion that their suit is not barred "because EPA will not be involved in [r]espondents' state law action against ARCO," Opp. 22, is erroneous. Section 9613(h) does not require that EPA "be involved" in the suit; section 9613(h) applies if the suit constitutes a "challenge" to the response action or seeks "review" of the EPA order. In any event, the Ninth Circuit remanded the case to state court for determination of whether ARCO's routing and treatment of the waters was "in conformity with the EPA's order." Pet. App. 5a. The litigation will focus on the meaning of EPA's orders, including the provisions concerning compliance with state water law, and could lead to inconsistent interpretations of them.

c. Respondents' reliance on an excerpt from the United States' brief in opposition to ARCO's motion to dismiss, Opp. 22, is misplaced. There, the United States responded to ARCO's argument that respondents' exclusive remedy was an action for inverse condemnation against the United States for an alleged taking of water rights without just compensation; the United States argued that ARCO's position was correct only if principles of *ordinary* preemption defeated respondents' claims against ARCO, and that those principles did not do so. CR 101 at 9-10, 11-19. In any event, the United States' position concerning the relationship between the damages claims and ARCO's performance under CERCLA is incorrect. Pet. 23-24; *infra* at 9.

2. Respondents link "challenges" with ordinary preemption, arguing that state law is not preempted unless compliance with both federal and state law is a "physical impossibility." Opp. 24.[2]

a. Respondents' premise -- that ordinary preemption is at issue -- is erroneous. *See supra* at 2. Thus, their arguments concerning physical impossibility, one aspect of ordinary preemption, are inapposite. Respondents implicitly suggest that their claims do not constitute "challenges" unless ARCO can show that it is unable to comply with both EPA's orders and the state law respondents are seeking to enforce. Opp. 24. This argument highlights the conflict among the circuit courts in interpreting "challenges" because both the First and Fifth Circuits have refused to read any such restrictions into the plain language of the statute. *Reardon*, 947 F.2d at 1513; *Voluntary Purchasing*, 889 F.2d at 1388-89.

b. Respondents mistakenly rely on arguments the United States made concerning compliance with state and federal law. Opp. 24. The passage respondents quote is from the United States' memorandum in opposition to ARCO's motion to dismiss, CR 101 at 16, and concerns ordinary preemption, *not* complete preemption, or the meaning of "challenge." To the extent respondents read the passage as applying to "challenge," it is incorrect for the reasons set forth in (a) and (d) of this paragraph.

c. Respondents' reliance on the Ninth Circuit's comment concerning purchase of senior water rights, Opp. 24, Pet. App. 5a n.6, is misplaced. The Ninth Circuit was addressing ARCO's argument that respondents' exclusive remedy was an inverse condemnation claim against the government, not whether "physical impossibility" affected the meaning of "challenge" under section 9613(h). In any event, the court's comment concerning purchase of senior water rights was erroneous. *See* Pet. 24 n.8.

d. Even if "physical impossibility" were pertinent to the meaning of "challenge" as used in section 9613(h), a determination of whether ARCO can comply both with state water law and EPA's orders requires an actual

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[2]Respondents make factual assertions that are not supported in the record and that ARCO disputes. *See, e.g.*, Opp. 1 (ARCO sold water rights for the treatment ponds in 1985); *id.* 24 (senior water rights were available for ARCO's purchase).

"review" of those orders. Thus, respondents' claims are barred by the provision of section 9613(h) precluding such "review." Pet. 23.

3. ARCO argued that even if the Ninth Circuit's interpretation of "challenge" were correct, its conclusion that claims for compensatory and punitive damages would not involve altering the EPA order or interfere with the cleanup, Pet. App. 5a, is inconsistent with *International Paper v. Ouellette*, 479 U.S. 481 (1987), and *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). Pet. 23-24.

a. Respondents incorrectly claim that ARCO "asserts that *International Paper* . . . enunciates a *per se* ban on compensatory and punitive damages suits against polluters." Opp. 25. Rather, ARCO showed that the Ninth Circuit's view of what claims constitute "challenges" conflicts with this Court's understanding, expressed in *International Paper* (and *Garmon*), of the impact a judgment for damages can have on a defendant's conduct, including conduct taken pursuant to government order. Pet. 24.

b. Respondents attempt to distinguish *International Paper*. Opp. 25-26. None of these arguments addresses this Court's recognition that a judgment for damages under Vermont law, arising from activities authorized by a New York permit, would "at a minimum" cause the defendant "to change its methods of doing business and controlling pollution to avoid the threat of ongoing liability." 479 U.S. at 495. The Ninth Circuit's view of the impact on ARCO of a state court judgment for compensatory and punitive damages, Pet. App. 5a, is directly contrary to this rationale.

4. The Ninth Circuit's decision conflicts with the Seventh Circuit's reading of the section 9613(h) provision that withdraws jurisdiction to "review any order issued under section 9606(a)." Pet. 23.

a. Respondents argue that this provision applies only when claims are "substantially dependent" upon interpretation of the order. Opp. 23 (citing *Caterpillar*, 482 U.S. at 395 and *Franchise Tax Board*, 463 U.S. at 29 n.28). First, this view finds no support in the plain meaning of the statutory language, which denies jurisdiction to "review any order", without qualification. Second, *Caterpillar*, and the footnote in *Franchise Tax Board* on which respondents rely, address what claims "arise under" section 301 of the Labor Management Relations Act (LMRA), *not* what claims seek "review of any order" within the meaning of section 9613(h) of CERCLA. Third, even if respondents' interpretation were correct, this

provision would apply because the Ninth Circuit held that respondents' claims *are* wholly dependent on a "review" and interpretation of EPA's orders. Pet. App. 5a (claims require proof that ARCO's diversions were not in conformity with EPA's orders).

b. Respondents err in relying on *Mayor and Council v. Klockner & Klockner*, 811 F. Supp. 1039 (D.N.J. 1993). In quoting the opinion, respondents omit the court's reference to "ERA" in the phrase "whether an *ERA* action could proceed . . . ." *Id.* at 1055 (emphasis added). *See* Opp. 23. The "ERA" is the Environmental Rights Act, N.J.S.A. 2A:35A-1; it entitles private citizens to bring suit to enforce environmental statutes only in "those instances where the government has not acted." *Id.* at 1054. *Klockner* holds that the kind of "review" of governmental action necessary to determine whether the ERA action could proceed does not constitute "review of any [section 9606(a)] order" within the meaning of section 9613(h). *Id.* at 1055-56.

CONCLUSION

For the reasons set forth above and in the petition, certiorari should be granted.

Respectfully submitted,

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